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Taxpayer's Rights

Theory, Origin and Implementation

Series on International Taxation

Volume 31

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Taxpayers' Rights

Theory, origin and Implementation

by

Bentley

KLUWER LAW
INTERNATIONAL

Published by
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

In all other countries Sold and distributed by,
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

Sold and distributed in North, Central and South America by
Aspen Publishers, Inc.
7201 Mc Kinney Circle
Frederick, MD 21704
United States of America

ISBN 978-90-411-2650-4

© 2007 Kluwer Law International BV, The Netherlands

A catalogue record for this book is available from the Library of Congress

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Printed and bound in Great Britain by Antony Rowe Ltd.

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CHAPTER ONE

Introduction

I. Background

Perhaps it was a symptom of a wider change in economic thinking when Jeremy Bentham made a remarkable if invisible return to the stage at the 2005 Davos World Economic Forum. A workshop comprising several leaders of economic thought explored the reasons why nations do not become happier as they become wealthier. What, they wondered, makes people happy? The euphoria that breaks out when a country is chosen to host the Olympics, wins a World Cup or a major sporting event suggests that money doesn't buy happiness; although it may help to buy sporting success. Bentham the utilitarian would argue that this shows that economic happiness as the sum of good feeling far outweighs the bad.

Great sporting success is often State-sponsored and everyone can revel in the enjoyment of the occasion, however rich or poor. One or more individuals become the surrogate source of happiness for a nation, which for a moment rests from its struggles to bask in collective glory. The British economist Lord Layard, takes this point further to suggest that people are happier if they are not competing hard against each other and can take time to enjoy life going beyond such major sporting events. He argues that[1] 'only higher taxes can force people to stop competing and restore a healthy, happy work-life balance.' That is a moot point. However, implicit in the argument is the importance of a sense of fairness. People want to be treated as well as their neighbour even if all their

[1] T. Weber, 'Why money doesn't buy happiness', *BBC News*, 27 January 2005, <news.bbc.co.uk>, 1 December 2006.

striving does not necessarily result in them having as much wealth. This is particularly true of taxation.

What seems to be well established from the wisdom literature of the ancients through to the most modern management theory is that if you are going to do something that people do not like and you want them to tolerate or even enjoy it, make sure that you do it with as much fairness, transparency, consultation and engagement as possible. If you are going to tax people, make sure they know that they are doing something for the greater good, that the process is as painless as possible and that they don't feel that they are paying more than their fair share.

This book explores the way that this can be done. It is an unashamed apologetic for justice and the rule of law in taxation. Without justice and the rule of law, taxation becomes an arbitrary exaction at whim. It remains internally inconsistent and cannot be fully effective and efficient. Unfair taxation imposed outside the rule of law works inevitably towards the self-destruction of its policy intent. Instead, the implementation of the principles and approach set out in the following chapters provide a useful guide to best practice in tax administration that is also most likely to support a robust tax system. It may even contribute to the increased happiness of society.

Messere, De Kam and Heady[2] identified several major trends in taxation and a growth in benefits designed to improve society during the second half of the 20th century. The trends included: increased social security contributions; the adoption and expansion of Value Added Tax (VAT), structural changes to personal income tax, corporate income tax and taxes on capital, changes to the tax/benefit treatment of families and changes in the tax mix, in part to make tax systems more efficient and more effective.[3] The reforms to implement these trends were associated with significant improvements in tax administration.[4] The tax law was increasingly used to facilitate tax administration. New management techniques and computerization changed the way the system was administered. Voluntary compliance completely transformed the approach to tax administration.[5]

In a wider context and again as society sought to improve itself following the Second World War, there was significant development in the protection of

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2 K. Messere, F. de Kam and C. Heady, *Tax Policy: Theory and Practice in OECD Countries* (Oxford, OUP, 2003), ch. 2.

3 Ibid.

4 Ibid., pp. 30-31.

5 Ibid.

human rights. The United Nations Charter and the Universal Declaration of Human Rights sparked a proliferation of human rights treaties and conventions.[6] Some of these, notably the European Convention on Human Rights, took a role in the protection of human rights previously guarded jealously by domestic law.[7] The strengthening human rights focus saw the introduction across the world of constitutions containing strong human rights protection and numerous charters or bills of rights. The strength of this movement coincided in part with the inexorable spread of democratic government and the rule of law.[8] However, a significant feature of almost all rights documents was the broad exclusion of matters pertaining to taxation.[9]

Yet, in 1987, the International Fiscal Association held its first seminar on *Taxation and Human Rights*.[10] It explored a range of tax matters influenced by the application of the European Convention on Human Rights. In the years that followed, it was found that both international human rights instruments and domestic protection of human rights began to influence tax matters. Albregtse and Van Arendonk in 1998 published a compilation of papers from a 1996 European Fiscal Studies Conference, which explored the growing range of protection for taxpayers in a number of European countries.[11] This was followed by a range of articles and books exploring the influence of human rights on tax matters.[12]

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6 C. Ovey and R.C.A. White, *Jacobs and White: The European Convention on Human Rights* (4th edn., Oxford, OUP, 2006), ch. 1.

7 Ibid., p. 4.

8 Ibid., pp. 4-6.

9 Discussed, for example, in P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review*, 211, 213.

10 International Fiscal Association, *Taxation and Human Rights* (Rotterdam, Kluwer Law and Taxation Publishers, 1988).

11 D. Albregtse and H. Van Arendonk, *Taxpayer Protection in the European Union* (London, Kluwer Law International, 1998).

12 For example, P. Baker, above n. 9; C.O. Lenz, 'The Jurisprudence of the European Court of Justice in Tax Matters', (1997) 2 *EC Tax Review*, 80; S. Raventós, 'Recent Income Tax Cases before the European Court of Justice: Impact on Future Tax Policy in Europe' (1998) 38 *IBFD Bulletin*, 336; R. Persson-Österman, 'Human Rights in the Field of Taxation: a View from Sweden' (1999) 2 *The Cambridge Yearbook of European Legal Studies*; and M. Lang (ed.), *Direct Taxation: Recent ECJ Developments* (The Hague, Kluwer Law International, 2003). Further examples are used throughout the book.

Taxpayers' Rights

The major changes in tax administration, meanwhile, had altered the way revenue authorities were treating taxpayers, particularly as they sought to encourage voluntary compliance with the tax law.[13] As a reflection of this, in 1990 the OECD released a report of a survey of taxpayers' rights and obligations.[14] The report focused not on human rights influences, but the relationship of taxpayers' rights to the compliance and enforcement powers of revenue authorities.[15] The report reflected the increase in interest in taxpayers' rights and that interest was reflected in the subsequent growth in the number of administrative charters of taxpayers' rights.[16]

Something of a two-strand approach to taxpayers' rights developed. The revenue authorities concentrated closely on relating the development of rights to the improvement in the relationship between the revenue authority and taxpayers.[17] This is reflected by then Australian Commissioner of Taxation, Michael Carmody, in 1998, when he said in a paper aptly entitled, 'Future

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13 K. Messere, F. de Kam and C. Heady, above n. 2, p. 31.

14 OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (Paris, OECD, 1990).

15 Ibid., p. 7.

16 Described e.g., in D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998); P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001); M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22; S. James, K. Murphy and M. Reinhart, 'The Taxpayer's Charter: A Case Study in Tax Administration' (2004) 7 *Journal of Australian Taxation*, 336; and S. James, K. Murphy and M. Reinhart, 'The Citizen's Charter: How such Initiatives might be More Effective' (2005) 20 *Public Policy and Administration*, 1.

17 A comprehensive analysis and review of the research to the late 1980s can be found in J.A. Roth, J.T. Scholz and A.D. Witte (eds.), *Volume 1 — Taxpayer Compliance: An Agenda for Research* and J.A. Roth and J.T. Scholz (eds.), *Volume 2 — Taxpayer Compliance: Social Science Perspectives* (Pennsylvania, University of Pennsylvania Press, 1989). Later research is reviewed in J. Wickerson, 'The Changing Roles of Taxpayer Audit Programs: Some Recent Developments in the Australian Taxation Office' (1994) 4 *Revenue Law Journal*, 125; J. Hasseldine, 'How Do Revenue Audits Affect Taxpayer Compliance?' (1993) 47 *IBFD Bulletin*, 424; V. Tanzi and P. Shome, 'A Primer on Tax Evasion' (1994) 48 *IBFD Bulletin*, 328; G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (Amsterdam, IBFD and ATRF, 1997); and V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, Ashgate Publishing Ltd, 2003).

Directions in Tax Administration Or Community Confidence: The Essential Building Block':[18]

> At the end of the day, any tax system relies on the underlying support of the community. Equally, any tax administration will only be capable of performing its role effectively if it has the confidence of the community in the way it goes about its job. It is this recognition that is fundamentally shaping our approach to tax administration.

A number of international reports were issued reinforcing the importance of taxpayer right protection. For example, the OECD Centre for Tax Policy and Administration published in its Tax guidance series, *Principles of Good Tax Administration — Practice Note* (2001) and *Taxpayer Rights and Obligations* (2003),[19] which stressed the importance of outlining and communicating to taxpayers their rights and obligations. The IMF *Manual on Fiscal Transparency* said that 'Taxpayers' rights should be clearly stated'.[20]

However, commentators began to explore a larger framework for taxpayers' rights looking beyond rights as a basis for improved compliance towards a broader rights context.[21] This formed the basis for and was specifically raised by most contributors in the author's 1998 comparative work on taxpayers' rights.[22] Sawyer's 1999 work called for an international statement on taxpayers' rights so that consistent rights could be developed.[23] Baker and Groenhagen argue forcefully for an international codification of taxpayers' rights.[24]

To bring together the two strands: taxpayers' rights supporting voluntary compliance; and taxpayers' rights in the broader legal application; requires a

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18 M. Carmody, 'Future Directions in Tax Administration or Community Confidence: The Essential Building Block' in C. Evans and A. Greenbaum (eds.), *Tax Administration: Facing the Challenges of the Future* (1998 Prospect), ch. 16.

19 Available at <www.oecd.org>, 1 November 2006.

20 Fiscal Affairs Department, *Manual on Fiscal Transparency* (Washington DC, IMF, 2001), p. 20.

21 Above n. 16, and *see* also, e.g., D. Deák in 'Right to Right Tax Laws' (2000) 28(3) *Intertax*, 110; A. Halkyard, 'Treating Taxpayers Right: Taxpayers' Rights with Special Reference to Hong Kong' (2001) 9 *Asia Pacific Law Review*, 133; and A. Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries — Have New Zealand Taxpayers Been ''Short-Changed''?' (1999) 32 *Vanderbilt Journal of Transnational Law*, 1346.

22 D. Bentley, above n. 16.

23 A. Sawyer, above n. 21, p. 1347.

24 P. Baker and A.M. Groenhagen, above n. 16.

more substantial theoretical framework and classification of rights than is available in the general literature. Both relate to tax administration and together cover the legal and administrative aspects of taxpayers' rights. The OECD statements of best practice identify some of the more important rights. However, they are brief and restrict themselves largely to administrative rights in the context of improving voluntary compliance. There is a stated need for a comprehensive model of taxpayers' rights covering both the administrative and the legal. The model should be grounded in a framework that goes beyond compliance to encompass the legal theoretical basis for taxpayers' rights.

The need is greater in that Messere et al.,[25] identify that the move to reform continues unabated. The rationale for the OECD practice statements is to provide guidance for revenue authorities as they try to develop best practice. This is important both for developing countries as a standard to follow[26] and for developed countries as a benchmark for quality assurance.[27] Currently, there is therefore no comprehensive analysis of best practice in the area of taxpayers' rights beyond the minimal guidance provided in the OECD practice statements.

II. Purpose

The purpose of this book is to fill the gap and provide a model of taxpayers' rights. The theory and origin of taxpayers' rights is an important starting point. It ensures that the model is not constructed to suit a particular viewpoint. Rather, it is founded in legal theory and based on long-established principles that should underlie any tax system. The book provides a classification of rights based in a detailed analysis of the enforcement mechanisms that shape and colour the implementation of each right. Above all, the book provides the analysis that allows the implementation of each right in any context.

The aim is to provide information comprehensive enough to satisfy a wide range of users, including:

– governments, policy advisers and consultants involved in the review or the reform of tax systems;

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25 K. Messere, F. de Kam and C. Heady, above n. 2.

26 Discussed in R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, (ed.), *Comparative Tax Law* (The Hague, Kluwer Law International, 2003), p. 95, p. 110.

27 The stated aim of the two practice notes, *see* OECD, above n. 19.

- revenue authorities for benchmarking and quality assurance;
- taxpayer representative groups to provide input into best practice tax administration;
- taxpayers to understand the scope and content of their rights and
- researchers in taxation in both legal and non-legal disciplines to understand the legal framework for taxpayers' rights.

Although space precludes detailed analysis of each of the individual issues raised in this book, the whole provides a comprehensive overview of the theory, origins and implementation of taxpayers' rights. The discussion uses a mix of analysis and synthesis as it draws from a broad range of diverse materials across disciplines and jurisdictions. The aim is to pull together some of the threads of legal and other theories and from different backgrounds and environments. In this way there is some chance of providing a broadly acceptable model of taxpayers' rights.

The choice of relevant rules and standards relies on making connections across often dissimilar and unrelated comparative and international concepts. The proposals for reform are nuanced to cope with different contexts across diverse jurisdictions; but with appreciation of the implications of developments in the different international fields to recommend only what is possible.

III. Outline

Chapter 2 of the book provides the rationale for a model of taxpayers' rights and subsequent chapters develop the basis for formulation of a model of taxpayers' rights in Chapter 9. For ease of reference, the model set out in Chapter 9 is called the 'Model' throughout.

The rationale in Chapter 2 is drawn from an examination of legal and rights theory, which provides the basis and origin of the rights developed in later chapters. Too often, a discussion of taxpayers' rights begins with particular rights and they are considered out of context. This approach also provides a basis for arguing that taxpayers' rights are appropriate only for more developed tax systems. The analysis in Chapter 2 considers this argument but shows from the literature covering both theory and practice of tax administration that a two-tier Model is appropriate to provide guidance on best practice to both developed and developing countries.

Chapter 2 also focuses on a common view that taxpayers' rights and obligations must be considered together. It shows that although the claim

has merit, to do so would require the construction of a complete tax code. The aim of this book is to consider only that aspect of a tax code that relates to taxpayers' rights. The chapter therefore argues that the Model need not include both rights and obligations. Next, it confronts the claim that there is little incentive for states to adopt taxpayers' rights. From an analysis of the literature and practice it concludes that in the global context a Model is realistic and that there is significant incentive for states to adopt the rights contained in a Model.

Chapter 3 analyses a wide range of major reports into tax systems and demonstrates that they have developed a common set of principles. These principles can be applied in later chapters to provide justification for the rights chosen for a Model. Chapter 3 identifies the difficulties that will arise in interpreting the rights contained in the Model based on an analysis of current international experience. It recommends that this can be solved in part by recognising both the divergence between legal systems but also the development of common standards.

Chapter 4 first assesses the need for a guide to best practice in relation to taxpayers' rights in the context of both national and international developments. It then derives from a range of legal theory a classification for the rights chosen based on whether they are enforced by law or administratively. This in turn provides the foundation for the analysis of the rights in subsequent chapters.

Chapter 5 explores the nature of rights through their method of enforcement. It demonstrates from constitutional and alternative dispute resolution theory that there is scope for a wide range of measures to enforce taxpayers' rights effectively and analyses each method of legislative and administrative enforcement. The Chapter concludes that the method of enforcement is critical to the scope, content and effectiveness of a right.

Chapters 6 to 8 provide an analysis of individual rights to be included in the Model based on methods of enforcement described in Chapter 5 and an analysis of internationally accepted standards of best practice. Chapter 6 examines the primary legal rights that underlie the fundamental operation of the tax system. Chapter 7 analyses the features of good tax administration and the rights that flow from it. This includes an examination of taxpayers' charters and principles of good administrative practice. Chapter 8 analyses rights that flow from the essential functions and operation of the tax administration. Chapter 8 uses a functional analysis in examining the rights attaching to information gathering, audit and investigation; assessment; sanctions and enforced collection; and objection and appeal.

Chapter 9 draws on the earlier chapters to provide a Model of Taxpayers' Rights as a guide to best practice in tax administration.

IV. Limits and assumptions

Although it attempts a comparative analysis, this book focuses significantly on common law jurisdictions in the examples it provides and the theories to which it refers. This is an acknowledged weakness in the analysis behind the Model. The author was constrained in part by language to materials in English. However, the weakness does not undermine the Model itself, which reflects a number of international instruments, documents and surveys that when drawn together, produce much common content.

The book has a strongly Australian emphasis, because that is the jurisdiction in which it was written. However, Australia is widely recognized as one of the leaders in best practice in tax administration, which provides justification for this approach.

The book is constrained in its analysis in each chapter by the vast literature on almost every topic that exists both generally and in each jurisdiction. The general literature on taxpayers' rights is very limited and is reviewed comprehensively. However, the literature on each specific topic and right is substantial, often warranting many books to cover the breadth of the topic. It is impossible to cover thoroughly each area and the literature from each jurisdiction. The book therefore takes the approach that the generally accepted rules and principles provide a basis for best practice. This can be idiosyncratic but it provides a sufficient framework for discussion, opposition and amendment.

The target of the Model is not the general public, although they would benefit from knowledge of the Model. It largely comprises governments, policy makers, revenue authorities, consultants and taxpayer representative groups. There is therefore no need to provide an educational document designed to enhance voluntary compliance. It is also unnecessary to provide a comprehensive tax code containing obligations as well as rights. That goes far beyond the scope of this project.

The Model is based largely in the law and legal theory. Reference is made to the work of accountants, economists and other disciplines. However, the book does not pretend to cover the literature of those disciplines except insofar as it is directly relevant to issues considered. The book does provide a wide survey of relevant literature, which is discussed in more detail, where

particularly significant, in the footnotes. All references are provided in the bibliography in what should prove a useful compilation of the relevant literature.

The Model provides a guide to best practice that applies primarily to international standard setting for domestic laws governing tax administration. There are some implications for international agreements and this would often mean that the procedures would be more onerous if suggested changes to comply with best practice are introduced.

The Model is drafted so that it can be adapted for legislative or administrative enactment. As is made clear in the book and introduction, it is essential to adapt it to the relevant context. Accordingly, it does not adopt a drafting style suitable for a particular kind of legislation but is cast generally for ease of understanding.

The law and practice is current at 1 October 2006. Some adjustment has been made for documents issued during October and the first half of November 2006.

CHAPTER TWO

The Rationale for a Model

The rationale for a model

I. Introduction

This Chapter sets out the underlying rationale for why it is timely and beneficial to articulate a Model of taxpayers' rights as a guide to best practice in tax administration. It first grounds the concept of a Model in existing rights theory. The first section shows that taxation is a restriction on the fundamental rights of the individual. Individuals accept taxation to fund the state and the state-provided benefits that flow back to them. Tax is imposed by law, forms part of the legal framework and benefits from procedural rights within it. However, it is only recently that the concept of specific taxpayers' rights has developed that could form the basis for a Model of taxpayers' rights.

Section 3 raises the problem of subjectivism and relativism in the rights context. It suggests that unless there is a minimum set of rules that can be agreed, the concept of a Model is worthless. Section 4 finds the solution in rights theory, which has recognized the concept of universally accepted minimum standards. In doing so, rights theory requires that standards should be adapted to their context when they are implemented. Section 5 queries whether tax systems are too diverse to discover minimum standards. It uses the example of harmful tax competition to show how such standards can and have developed. However, it notes that implementing taxpayers' rights requires a different approach from the example of harmful tax competition and suggests that adopting taxpayers' rights gives greater latitude for choice.

Setting the Model up as a guide to best practice is more appropriate than imposing a set of rules. Given the diversity of tax systems, a two-tier Model of rights is put forward.

Section 6 sets out the advantages and disadvantages of a two-tier Model and concludes that a two-tier Model best deals with the disparity between developed and developing tax systems. It offers a more widely appropriate and adaptable set of guidelines. They are therefore more likely to be used. Section 7 acknowledges that a Model is possible, but asks the question whether a Model of taxpayers' rights is realistic. It analyses the general development of national and international relationships and trends in the tax context and concludes that a Model is both realistic and timely. Section 8 considers whether the Model should include both taxpayers' rights and obligations. It notes that it is important to draw a distinction between the publication of a charter or other set of rights to the public and a Model of best practice for tax administrators and policy makers. The section suggests that the tax law as a whole sets out taxpayers' obligations and the purpose of the Model is to provide a set of standards against which just one element of that law can be assessed. It concludes by favouring an approach to standard setting that starts with the basic rights of taxpayers and considers to what extent they should be limited in the interests of the state requirement to collect taxes.

Section 9 addresses the critical question of what should be the basis of the rights chosen. It suggests that the basis should be widespread acceptance of standards and that they should be expressed generally enough so that they can be adapted to the context of individual jurisdictions. They should also fit within the accepted principles that should underlie any tax system and that are set out in Chapter 3. Section 10 concludes the chapter by analysing the incentives for states to adopt the Model. It focuses on the correlation between improved compliance and a revenue authority's relationship with taxpayers; the importance to democratic states of removing opportunities for obvious abuse of power by the state; and the correlation for developing states between socio-economic development and good governance.

II. Taxation and rights

The right to tax is founded in recognition of individual property rights. A society that does not recognize individual property rights of any kind would find it difficult to levy taxes, as they are commonly understood. Murphy and Nagel have argued that there are two fundamental conceptions of property

rights and that these flow from consequentialist and deontological theories.[1] Both are normative theories.

Consequentialism is arguably based in the theories of Hume,[2] but is perhaps more recognisable in the classical utilitarianism of Bentham and Mill with its emphasis on maximizing individual preferences.[3] It holds that 'the ultimate standard for evaluating a policy or institution lies in the value of its overall consequences'[4] and that the net benefit of individual property rights clearly justifies their protection. As a system of property rights underpins the global economic system, consequentialist theory suggests that there is little argument over the extent of its social utility.

Deontological theories focus on the standards inherent in the law that they argue should govern its nature, or what it ought to be. Locke[5] and Kant, for example, argue that the concept of liberty, with its stress on the importance of protecting the liberty of one individual against another, encompasses the protection of individual property rights.[6] This supports 'freedom from interference in the acquisition and use of property'.[7] Even a Hegelian view, which accepts a broader concept of public interference, recognizes the importance of property rights to individual liberty.[8]

Recognition of individual property rights presupposes some element of liberty of the individual. It also presupposes a social order that recognizes rights as against other people and duties and obligations within that social order.[9] On the one hand property rights form part of a citizen's natural

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1 L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (New York, OUP, 2002), p. 42.

2 Ibid., p. 43.

3 Discussed extensively in N.E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London, Sweet and Maxwell, 1986) ch. 1.

4 L. Murphy and T. Nagel, above n. 1.

5 Discussed in L. Murphy and T. Nagel, above n. 1, p. 43.

6 N.E. Simmonds, above n. 3, p. 25.

7 L. Murphy and T. Nagel, above n. 1, p. 45.

8 G.W.F. Hegel, T.M. Knox (trans.), *Philosophy of Right* (USA, OUP, 1967), p. 40.

9 The process of the origin and development of taxation in social orders is beyond the scope of this book, *see further*, F.H.M. Grapperhaus, *Taxes, Liberty and Property: The Role of Taxation in Democratization and National Unity 511-1787* (Uitgeverij Walburg Pers, 1989), p. 204. So, too, is the nature of the obligations, *see a discussion* of W.N. Hohfeld, '*Fundamental Legal Conceptions as applied in Judicial Reasoning and Other Legal Essays*' (New Haven, CT: Yale University Press, 1923), in L.W. Sumner, *The Moral Foundation of Rights* (New York, OUP, 1987), p. 18 and N.E. Simmonds, above n. 3, p. 129. *See further* on the balance of rights and duties,

entitlement, whereas on the other they promote the general welfare and social organization.[10] The prerequisites for taxation are therefore derivative. They flow from the existing social order. In deontological theory, taxation itself is not seen as a fundamental good but is justified as a necessary limitation on individual freedom.[11] In consequentialist theory, taxation is intrinsic to the overall system of property rights designed to fund the maintenance and development of the social order and to promote beneficial economic results.[12]

Within these broad approaches there are numerous definitions of the concepts of rights and duties that have developed more recently.[13] Taxation is a specific obligation imposed under the law and the state has the power to collect it. As with a criminal sanction it is direct and enforceable. How these elements are conceived shapes the definition of its nature. For example, Nozick's strong conception of individual choice and the liberty of the individual would see taxation as necessary to uphold the state's pursuit of such goals but limited as far as possible, given its direct interference with the basic concept of maximizing individual choice.[14] Communitarians, such as d'Entrèves, take a subjective view of shared community conceptions as to what is good.[15] They would see taxation as a means of distributing important social goods and that it should therefore have a much wider role.

D.C. Hodgson, *Individual Duty within a Human Rights Discourse* (Hants, UK, Ashgate Publishing Limited, 2003), and S. Stoljar, *An Analysis of Rights* (New York, St. Martin's Press, 1984).

10 L. Murphy and T. Nagel, n. 1, p. 44.

11 J. Finnis, in *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) posits a type of common good that is not fundamental, but which allows members of a community to collaborate to attain reasonable objectives (p. 155) supported by a legal system that is specific, not arbitrary and maintains reciprocity between subjects of the system and its lawful authorities (pp. 276-277). *See also*, L. Murphy and T. Nagel, ibid.

12 Ibid. This is most clearly seen in the justification for the introduction of new taxes by politicians in budget speeches or election manifestos.

13 *See*, *e.g.*, L.C. Becker and C.B. Becker (eds.), *Encyclopedia of Ethics, Duty and Obligations Vols 1 and 2* (New York, Garland Publishing Inc., 1992); W.N. Hohfeld, above n. 9; H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford, Clarendon Press, 1994); and R. Alexy, *Theorie der Grundrechte* (3rd edn., Frankfurt, Suhrkamp, 1996).

14 R. Nozick, *Anarchy, State and Utopia* (New York, Basic Books, 1974), p. 26 *et seq*.

15 *See*, *e.g.,* A.P. d'Entrèves, *Natural Law* (London, Hutchinson University Library, 1967), ch. VI and the discussion in L.C. Becker and C.B. Becker, above n. 13, p. 181 *et seq*.

For all theories along the continuum, arguably including Marxist theories in which there is little recognition of individual property rights,[16] taxation is primarily concerned with funding the state and redistributing social goods. As with any exercise of state power there are limits on its exercise. This book is concerned with what these limits should be.

Essentially taxation can be seen as a barometer of the developing balance between state and individual rights. Legal theory as it affects taxation has always been more concerned with the structure of the tax system to determine how the tax system should be used in funding the state and distributing and redistributing social goods, than with taxpayers' individual rights. It focuses on the rules governing the level and rate of taxation, who and/or what should be taxed and how they should be taxed. Historically, detailed analysis of rules governing procedural fairness in how the tax rules are applied has not attracted the discussion among rights theorists that it has in other areas of the law.[17]

This structural focus is not surprising, as the arguments about the rights of individuals before the law are played out in other fields of the law. By the time attention turns to taxation, if it ever does, the legal system is usually sophisticated. Safeguards in place elsewhere flow into the taxation area, unless they are specifically excluded. This exclusion, explored further below, circumscribes the discussion on taxpayers' rights, for the general procedural rights applicable to all citizens usually apply to taxpayers.

Increasingly, however, the service-oriented culture of private enterprise is being applied to public administration. The traditional command and control approach to enforcement of taxation obligations is giving way to a responsive approach designed to motivate taxpayers to comply with their tax obligations.[18]

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[16] Although, 'taxation' of entities can occur within a Marxist State and is concerned with funding the central state organs and redistributing social goods in much the same way as any other society.

[17] Obviously, the general discussions on legal reasoning, from Llewellyn to Dworkin to MacKinnon to Kennedy, could apply equally to the tax law, but it has received little attention in broader theoretical writing. In contrast, regulatory scholars have recently given considerable attention to empirical research in taxpayer compliance, extending to taxpayers' perceptions of justice and fairness and how these impact on taxpayer compliance. For a useful survey of the literature, *see* M. Wenzel, 'Tax Compliance and the Psychology of Justice: Mapping the Field' in V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, Ashgate Publishing Ltd, 2003), p. 41.

[18] V. Braithwaite, 'A New Approach to Tax Compliance' in V. Braithwaite, ibid., p. 1.

One result has been an increase in charters.[19] However, even here, the focus of charters is on improved service delivery and relationships with taxpayers. It is not on broadening the scope of taxpayers' rights.

It is beyond the scope of this book to re-examine the origin and definition of rights. It will follow the standard definitions used in the international charters. Any differences will become evident in the analysis. There are many theories and they vary in their definition of rights.[20] The reality is that primary political and civil rights have been enforced by the national and international courts, whereas social, economic and developmental rights largely have not.[21] This is despite efforts to the contrary.[22] This book focuses on defining enforceable rights that relate to taxpayers and examining the mechanisms for their enforcement. It does draw on the welfare theory concept that legal rights have no value unless there is associated freedom to enjoy them.[23] In other words, there must be the ability to access the right for it to be a real right. Although the notions of right and enforcement are broader in the tax framework than in many other areas of the law, taxpayers' rights are primarily political and civil rights concerned with balancing the rights of individuals with their obligation to the state.

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[19] Described in N. Deakin, 'Accentuating the Apostrophe: The Citizen's Charter' (1994) 15 *Policy Studies* 3, 48.

[20] *See*, *e.g.*, C. Wellman, 'Concepts of Right' in L.C. Becker and C.B. Becker, above n. 13, p. 1100.

[21] Discussed generally in D.M. Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Dordrecht/Boston/London, Martinus Nijhoff Pubs, 1994). In describing the ECHR, M. Buquicchio-de Boer, 'Tax Matters and the European Convention on Human Rights' in *Taxation and Human Rights, A Survey of Case-law*, seminar proceedings at 41st Congress of the International Fiscal Association (Brussels, 1987), p. 59 states:

> The drafters of the European Convention on Human Rights intended to set up an international system of protection for what can be regarded as the 'classical' political and civil rights, excluding economic and social rights such as the right to social security or the right to work.

[22] *See* the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights drawn up in Maastricht in June 1986 and the *Report of the Committee on Economic, Social and Cultural Rights to ECOSOC* (1990), para. 2-14, discussed in K. Drzewicki, C. Krause and A. Rosas (eds.), *Social Rights as Human Rights: A European Challenge,* (Finland, Institute for Human Rights, Abo Akademi University, 1994), ch. 2.

[23] V.P. Viljaren, 'Abstention or Involvement? The Nature of State Obligations Under Different Categories of Rights' in K. Drzewicki et al., ibid., p. 43, p. 50.

III. Taxation, the state and the difficulty of relativism

Although this book does not explore the theories of the state, it is from those theories that the power to tax is drawn. Taxation is fundamental to the implementation of the theory of the state. As the French novelist, Karr, aptly commented in the middle of the nineteenth century, '*Plus ça change, plus c'est la même chose'*.[24] It is remarkable given the exponential increase in the pace of change how much the basic tenets of society remain the same. And so, too, do the basic tenets of our system of taxation. In Athens, in about 450 BC, Pericles could argue strongly for the importance of the rule of law as the foundation of democratic society[25] — a society inclusive of a basic tax system.[26] Diocletian, in about 300 AD overhauled the tax system of the late Roman Empire to cope with inflation and economic decline.[27] In Norman England, the breadth of exemptions available to strong interest groups undermined the effective collection of Danegeld.[28] The 1579 Union of Utrecht, which 'functioned as a kind of constitution for the Republic of the Seven United Provinces of The Netherlands'[29] struggled to introduce common taxation. Even more difficult under that Union was implementation of the non-discrimination clause:[30] harmful tax competition was, it seems, alive and well.

Taxation has operated indiscriminately throughout history and across states with conflicting values and social goals. As with any law, the theory of taxation tends to become distorted in its implementation. The process of law-making breaks it down into specific areas of application (quite apart from the influence of lobbyists and interest groups) and the original theory disintegrates further through the process of case-by-case interpretation.[31]

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24 'The more things change, the more they are the same', from A. Karr, *Les Guêpes* (6th Series, 1859), p. 304.

25 C.M. Bowra, in *The Greek Experience* (Cardinal edn., London, Sphere Books Ltd, 1973), ch. 4 discusses the democratic focus of Athens and the Greek concern with the rule of law. Pericles speaks for himself in Thucydides, trans. by R.E. Warner, *History of the Peloponnesian War* (Penguin Classics, 1975), bk 2.37.

26 C.M. Bowra, ibid.

27 Described in A.E.R. Boak and W.G. Sinnigen, *A History of Rome to A.D. 565* (6th edn., London, Macmillan, 1977), p. 445.

28 A.L. Poole, *Domesday Book to Magna Carta 1087-1216* (2nd edn., 1986), p. 418.

29 F.H.M. Grapperhaus, above n. 9.

30 Ibid.

31 For a discussion of this process generally, *see* T. Wilhelmsson, *Social Contract Law and European Integration* (Dartmouth, Ashgate Publishing Ltd, 1995), ch. 1.

As Wilhelmsson observes, 'One has to acknowledge the fact that it is possible to construct several different systems on the basis of the same concrete legal material'.[32] Within systems there also has to be flexibility and development using the same legal material. It is the classic differentiation between law making and interpretation[33] and is one reason why the development of human rights has been so successful in the second part of the 20th century. Theory is adapted to its context as it is applied. The same approach applies to taxation and rights related to it.

It is necessary to mention here the origin of law, without any attempt to do more than summarize some of the problems that exist given the current divergent views in legal theory. The source of taxation law is constitutional. Most sovereign nations have a constitution, which forms, as Kelsen put it, the Grundnorm, or source of other laws in the hierarchy of laws.[34] The right to tax occupies a special place in this hierarchy. Where even constitutions have now been found to be subject to overarching principles, these are subject to limitation when it comes to taxation. They do, nonetheless, affect taxing rules.

Where do the overarching principles that govern the actions of sovereign states come from? This goes back to the origin of the law itself and can be explored across numerous theories. Natural law theories were evident in various forms in early theocracies, in Greece and in the sophistication of Roman law. They were further developed by jurists such as Aquinas and were used as a basis for international law by Grotius. Although natural law is now limited in its popularity among theorists, it is reflected in the origin of the various human rights charters and many constitutions. Natural law was founded in absolute underlying principles.

With the 'enlightenment' and the introduction of social contract theory, the development of relativism in its numerous forms has changed the way law is viewed by many. Theories based in relativism in its broadest sense now must rely on some form of inductive reasoning to create certainty, where it can be argued that the underlying premise of their arguments suggests there is none. Arguably, even positivists, such as H.L.A. Hart, can only create an artificial and temporary certainty by describing how internal and external recognition

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32 Ibid., p. 19.

33 *See, e.g.*, E.W. Böckenförde, *Grundrechtstheorie und Grundrechtsinterpretation* (Neue Juristische Wochenschrift, 1974).

34 H. Kelsen, *The Pure Theory of Law* (Los Angeles, University of California Press, 1967), p. 8 *et seq*.

can provide an absolute legal system.[35] The internal issue of from where the new rules (or Dworkin's preferred 'principles') are drawn in the penumbra of uncertainty, when the established rules have run out, is a matter of the personal choice of the judge.[36] The external problem of what constitutes an immoral law and whether it should be obeyed, again, rests with personal choice.[37]

Many modern theorists have tended to build on the type of reasoning that theorists such as Holmes and Llewellyn introduced in the 19th and early 20th centuries. Holmes took the cynical view that judges interpret the law according to their own perceptions of what the law should be.[38] Llewellyn suggested that this process could be analysed to show an underlying theoretical approach.[39] The critical element for this analysis that is present in most approaches from radical feminists such as MacKinnon to postmodernists such as Murphy is that they emphasise the subjective and relative underpinnings of modern jurisprudence.[40] For most theorists there is now no such thing as a 'right law'.[41] Its rightness depends upon the perception of the party affected, how it is

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35 This was raised by R. Dworkin in *Taking Rights Seriously* (London, Gerard Duckworth and Co., 1977) but countered by N. MacCormick in *H.L.A. Hart* (London, Edward Arnold, 1981), and *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978). A useful discussion can be found in R.P. George (ed.), *The Autonomy of Law* (Oxford, OUP, 1999).

36 H.L.A. Hart, above n. 13, ch. VII. Or as R. Dworkin puts it in *Law's Empire* (London, Fontana Press, 1986), p. 225:

> According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.

37 H.L.A. Hart, above n. 13, p. 200.

38 O.W. Holmes Jnr, 'The Path of Law' (1897) 10 *Harvard Law Review*, 457, 466, reproduced in R.S. Summers, (ed.) *American Legal Theory* (Aldershot, Dartmouth Pub. Co., 1992), p. 3.

39 K.N. Llewellyn, 'A Realistic Jurisprudence — The Next Step' (1930) 30 *Columbia Law Review*, 431, reproduced in R.S. Summers, ibid., p. 155.

40 For example, C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Harvard University Press, 1987), and P. Murphy, 'Postmodern Perspectives and Justice' (1991) 30 *Thesis Eleven*, 117, reproduced in D. Patterson, (ed.) *Postmodernism and Law* (Aldershot, Dartmouth Pub. Co., 1994), p. 3. *See also* an analysis of liberal subjectivity in E. Santoro, *Autonomy, Freedom and Rights: A Critique of Liberal Subjectivity* (Dordrecht, Kluwer, 2003).

41 This requires a 'step of faith'. All such theories are based in the theorist's basic worldview.

interpreted and how it is applied. A law may seem right to the lawmaker, but constitute an 'immoral law' when applied to an individual facing circumstances not considered by the lawmaker, or considered and dismissed. Focusing on the subjective in this way removes even further the possibility of finding an absolute standard. How can the universal exist given the differences in subjective reality across the globe?

Philosophically, this creates a major difficulty in the analysis of the taxpayers' rights subset of human rights. If there cannot, by definition, be such a thing as a universal human right, it suggests that any attempt to define a subset of universal rights is futile. It follows that, relying on constitutional and internationally agreed protection of taxpayers' rights does not necessarily provide an agreed basis to begin formulating a model of taxpayers' rights. In order to create a model of taxpayers' rights there must be a minimum set of rules to which potential parties can subscribe.

IV. A practical solution and a model of taxpayers' rights

Fortunately, the human rights literature comes to the rescue, for it has recognized this problem. It is particularly relevant in the context of Africa, given the mix of religions, races and cultures on that continent. The domination by western culture of the formulation and content of the early international standards of human rights that claim to be universal is a matter of significant debate.[42] Has the western domination effectively denied basic African rights or are they universal?[43] Should the traditions, customary practices, political and

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[42] *See* A.A. An-Na'im and F.M. Deng (eds.), *Human Rights in Africa: Cross Cultural Perspectives*, (Washington DC, Brookings Institute, 1990), p. 15; O.M. Ejidike, 'Universality and Relativity in the African Human Rights Discourse', <www.nottingham.ac.uk/law/hrlc/june96/okey.htlm>, 5 September 2005; S.B.O. Gutto, *Human and Peoples' Rights for the Oppressed* (Lund, Lund University Press, 1993), p. 414; L. Lindholt, *Questioning the Universality of Human Rights-The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (Aldershot, Dartmouth Pub. Co., 1997), p. 20; and T. Maluwa, 'Discourse on Democracy and Human Rights in Africa: Contextualising the Relevance of Human Rights to Developing Countries' (1997) 9 *African Journal of International and Comparative Law*, 55. For a broader discussion, *see* D.C. Hodgson, above n. 9, p. 114.

[43] W. Schmale, *Human Rights and Diversity* (Goldbach, Keip Publishing, 1993), p. 8.

religious ideologies and institutional structures peculiar to Africa, or parts of it, create a separate and distinct classification of rights that is culturally specific?[44]

These questions were debated at length at the 1993 World Conference on Human Rights that resulted in the Vienna Declaration and Programme of Action.[45] Article 1 states that the universal nature of the rights and freedoms is beyond question. Article 5 affirms the universality of human rights and that some freedoms are fundamental. It recognizes the cultural specificity of some rights and requires the promotion of both the universal and culturally specific:[46]

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The universality of many of the rights contained in the African Charter on Human and Peoples' Rights supports this approach. The Charter came into effect in 1986 and 53 African states had ratified it by 2000.[47]

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[44] Discussed in H.J. Steiner and P. Alston (eds.), *International human rights in context* (2nd edn., New York, OUP, 2000), p. 366 and E. Brems, *Human Rights: Universality and Diversity* (Boston, Kluwer Law International, 2001), p. 25. *See further,* Y. Ghai, 'Bills of Rights: Comparative Perspectives' in R. Wacks (ed.), *Hong Kong's Bill of Rights: Problems and Prospects* (Hong Kong, Faculty of Law, University of Hong Kong, 1990), p. 15.

[45] Text contained in P.R. Ghandi (ed.), *Blackstone's International Human Rights Documents* (2nd edn., Oxford, Blackstone Press, 2000), p. 376.

[46] *See* D. Ayton-Shenker, 'The Challenge of Human Rights and Cultural Diversity', United Nations Background Note, (1995), <www.un.org/rights/dpi1627e.htm>, 1 November 2006 and United Nations, Vienna Declaration and Programme of Action, World Conference on Human Rights (Vienna, 14-25 June 1993), <www.unhchr.ch/huridocda>, 1 November 2006. This was supported by the 1993 Tunis Declaration at the World Conference on Human Rights in that year. *See* E. Brems, above n. 44, pp. 148-150.

[47] *See generally*, U.O. Umozurike, *The African Charter on Human and Peoples' Rights* (The Hague, Kluwer Law International, 1997).

The result does not, of course, resolve the source of the problem. There is no real analysis of the basis of universality in these documents other than the fact that they are universally recognized. We have returned to the positivist position, relying on the rule of recognition. Recognition thus becomes the rationale for adopting the rights and not their inherent nature. It is argued that recourse to natural law could resolve the issue, but that is beyond the scope of this book.[48] It is sufficient that there is recognition within the human rights arena, both practical and academic, that it is possible to develop a model of minimum rights to which most can subscribe.[49] However, it is also important to draw from the discussion the requirement that any model should recognize the diversity of the potential subscribers.

How does this translate to a model of rules that could govern the administration of the tax system? The goal is to produce a model of rules that does not exploit or espouse a particular worldview. Rather, it should take only those rules that are commonly understood or accepted. Because there has been little debate in the tax context, a model must draw on other areas of law where the rules are already in place. These will often be applied by analogy and must take account of the specific tax context. This approach has the advantage that the rules do not have to be created. They already exist elsewhere and can be adapted. There is a rich source of past interpretation and application within the different legal systems and internationally that can support the model and give it its credibility and relevance.

Returning to the jurisprudential analysis: adopting taxpayers' rights from a model, but integrating them into the context of a particular tax system is a classic example of how law develops. Where past interpretation within the system has proved inadequate for the current context, the rule-maker intervenes. The new rules are then developed and interpreted within that legal system in a way that fits the broader legal, political, economic and social context. In this way, the future and changing interests within the system are catered for.

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[48] D. Deák in 'Right to Right Tax Laws' (2000) 28(3) *Intertax*, 110, ably examines the need for recourse to such principles in the tax law context, arguing that they are found commonly in civil law systems.

[49] As stated by M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), p. 465, p. 471, 'There are … strong universalist trends which are not only applying international pressure to move towards a more standardised model but are also facilitating and helping to reinforce such convergence.'

One can use the analogy that Dworkin has developed in arguing that judges should take a literary approach in their interpretation of the law and understand that it is in a sense similar to a story.[50] The judge as writer should know and understand the original context, the structure and design of the legislation and 'the dominant lines' of past interpretation.[51] This enables the judge to fit their contribution or chapter into the story to enable its continuation within its broader themes and structures.[52] Using the example of his philosopher king, Hercules, Dworkin suggests that the judge should, in her or his decision-making, take account of the underlying political and moral principles that shape society.[53] The same approach is appropriate for the rule-maker seeking to integrate a model set of rules into any legal system.

V. The problem of diverse tax systems

Does this take sufficient account of the diversity of systems in which the model might be applied? It probably does not. Sophisticated tax systems contain complex rules governing complex transactions. By their very nature, they are likely to contain rights and obligations that go far beyond the requirements of a developing tax system.[54] The most complex tax systems are those found in the western democratic economies. It therefore makes it easier to develop more advanced rights and obligations that are generally acceptable to those economies. That is, indeed, what has happened through the Committee of Fiscal Affairs of the OECD. The rules developed at this level are not universally acceptable.

Take, for example, the development of rules to govern 'harmful tax competition'. The concept, the definition and the need for rules were a product of the OECD. They did not initially elicit broader acceptance. The acceptance they have had has been affected largely through the economic power of the OECD countries, the limited number of countries targeted and the economically weak position of those targets. Interestingly, the EU countries within the OECD took forward a different and more restrictive initiative aimed at their

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50 R. Dworkin, n. 36, ch. 7, and *Freedom's Law* (Cambridge, Harvard University Press, 1996), ch. 1.

51 Ibid., *Freedom's Law*, p. 10.

52 R. Dworkin, above n. 36, p. 228 *et seq*.

53 Ibid., p. 65.

54 This forms part of the wider debate found in forums such as the United Nations Development Program.

own more sophisticated economic framework. The approaches are worth exploring in more detail.

The OECD launched its project on harmful tax competition in 1996. The EU established its own approach to countering harmful tax competition, with the adoption of a package of measures by the Council in 1997.[55]

The EU measures were wide-ranging and focused specifically on harmful tax competition within the EU. They included draft directives on the taxation of savings and the taxation of cross-border interest and royalty payments, together with a non-binding code of conduct.[56] The code of conduct, although voluntary, was intended to work through political pressure and peer review. Significant debate followed the introduction of those measures. However, the existence of that debate illustrated the influence of the measures on domestic tax policy within the EU. Ireland, for example, acted quickly to replace its preferential tax regimes to avoid criticism from other members.[57]

In 1998, the OECD produced its Report, *Harmful Tax Competition: An Emerging Global Issue* (Report).[58] Implementation of the recommendations in this Report has had far-reaching implications for the national financial and tax policies of those countries listed as having harmful tax practices. But the recommendations also have potentially significant consequences for the national tax policy of member countries.

The Recommendations cover three areas: domestic legislation and practices; tax treaties; and international co-operation. All aim to eliminate harmful tax competition. The Report 'focuses on geographically mobile activities, such as financial and other service activities, including the provision of intangibles'.[59] Harmful competition is defined to include distortion of investment flows, attacks on the fairness and integrity of the tax system, discouragement

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55 Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 OJ (C2) 1, p. 1.

56 Resolution of the Council and Representatives of the Governments of the Member States, Meeting within the Council of 1 December 1997 on a Code of Conduct for Business Taxation, 1998 OJ (C2) 2, p. 2.

57 *See* E. Troup and P. Hale, 'EU Initiatives on Tax Harmonization: Do as I Say, Not as I Do?' (1998) 17 *Tax Notes International*, 1081.

58 Other institutions, such as the IMF, Financial Stability Forum and Financial Action Task Force, are also active in contiguous areas such as money laundering, supervision and transparency. Space precludes consideration of these activities in this article.

59 Report, p. 8, <www.oecd.org>, 5 September 2006. *See also* on the OECD website, the article by R.M. Hammer and J. Owens, Head of C.F.A., *Promoting Fair Tax Competition* (2001) in which he justifies the OECD approach.

of taxpayer compliance, changing the public spending and tax mix, shifting the tax burden to less mobile tax bases, and increasing administrative and compliance costs.[60] Key factors in identifying tax havens are: they have no or nominal taxes; they do not allow effective exchange of information; they lack transparency; and there is no requirement that an activity taking place in the jurisdiction should be substantial.[61]

The Report recommended the establishment of a Forum on Harmful Tax Practices and this was approved.[62] Member States were required to report to the Forum on their own harmful tax practices by 2000 and to eliminate them by the end of 2005.[63]

In 2000, the Forum produced a Report, *Towards Global Tax Co-Operation: Progress in Identifying and Eliminating Harmful Tax Practices* ('2000 Report'). It identified potentially harmful preferential regimes in OECD member countries.[64] The 2000 Report also identified jurisdictions viewed as tax havens.[65] Significantly, it excluded from this list those tax havens that made 'a public political commitment at the highest level to eliminate their harmful tax practices and to comply with the principles of the 1998 Report'.[66]

The 2000 Report proposed that any tax haven listed that did not commit to removing harmful tax practices would be included in a list of uncooperative tax havens.[67] It also proposed a framework for implementing a common approach to restraining harmful tax practices.[68] Another proposal, which demonstrates how broad the reach of the OECD is, covered the OECD's commitment to the extension of the work of the Forum to include non-member economies with similar concerns and that were 'prepared to accept the same obligations as OECD members'.[69] Meetings with non-member countries began in June 2000 to explore the extent to which they could be involved.[70]

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60 Ibid., p. 16.
61 Ibid., p. 23.
62 Ibid., p. 53.
63 Ibid., p. 56. *See Framework for a Collective Memorandum of Understanding on Eliminating Harmful Tax Practices* <www.oecd.org>, 1 September 2006.
64 2000 Report, p. 12, <www.oecd.org>, 1 September 2006.
65 Ibid., p. 16.
66 Ibid.
67 Ibid., p. 18.
68 Ibid., p. 24.
69 Ibid., p. 22.
70 *See The OECD's Project on Harmful Tax Practices: The 2001 Progress Report* ('2001 Report'), <www.oecd.org>, 5 September 2006.

After an extension of the commitment deadline to 28 February 2002 only Andorra, Liechtenstein, Liberia, Monaco, the Marshall Islands, Nauru and Vanuatu were listed as uncooperative Tax Havens.[71] All other tax havens had committed to introducing transparency into their tax systems and effective exchange of information, subject to the adequate protection of taxpayers' rights and the confidentiality of their information.[72] The OECD undertook to support committed jurisdictions so that they could implement those commitments.[73] *The 2004 Progress Report*[74] noted considerable progress 'in achieving a co-operative process with those countries and jurisdictions outside the OECD that have made commitments to transparency and effective exchange of information'.

There were a series of meetings of the OECD's Global Forum on Taxation that aimed 'to achieve high standards of transparency and information exchange in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD'.[75] It is arguable that the whole point of becoming a tax haven and offering the protection of stringent secrecy laws was because no other arrangement allowed fair competition on any level between, say, the US and the Republic of Nauru. The OECD, to facilitate action in a number of identified areas, co-ordinated a number of projects through the Global Forum. These included a factual review of the 'legal and administrative frameworks in the areas of transparency and exchange of information in over eighty countries'.[76] The 2006 Report continued what had proved a very effective method of imposing pressure on both participating and non-participating countries by publication.

The response to this example in the context of taxpayers' rights and obligations could be twofold. The OECD could use economic power to require countries to adopt a model of taxpayers' rights and obligations in the same way as it has influenced the national and financial tax policies of those countries listed as having harmful tax practices. The introduction of taxpayers' rights

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71 *See* <www.oecd.org>, 5 September 2006. Nauru and Vanuatu were removed by the end of 2003.

72 2001 Report, p. 11.

73 Ibid., p. 12.

74 OECD, *The OECD's Project on Harmful Tax Practices: The 2004 Progress Report* ('2004 Report'), p. 4, <www.oecd.org>, 5 September 2006.

75 OECD, *A Process for Achieving a Global Level Playing Field*, (2004), p. 2, <www.oecd.org>, 5 September 2006,.

76 OECD, *Tax Cooperation: Towards a Level Playing Field: 2006 Assessment by the Global Forum on Taxation*, p. 8, <www.oecd.org>, 1 September 2006.

would contribute to achieving high standards of tax administration 'in a way that is fair, equitable and permits fair competition between all countries, large and small, OECD and non-OECD'.[77] It would support foreign investment, encourage domestic compliance and thereby broaden the revenue base. Nonetheless, it will not happen as the economic interests and power of the OECD do not support it as a 'grand' initiative. A perceived fiscal imperative, an uncertain international political environment driven by fears of terrorism, and a relatively easy target, drove the early success of the attack on legal rules and structures in tax havens. There is no such fiscal imperative for OECD countries to require subscription to and application of a model of taxpayers' rights and obligations within every jurisdiction. The target base is also too wide and, as the Global Forum members have found, less able to comply.

The alternative is for there to be a two-tier model, the approach taken by the EU and in certain aspects of the OECD guidelines.[78] More developed economies could subscribe to a more advanced model of taxpayers' rights consistent with the greater obligations placed on taxpayers in a fully developed, complex and sophisticated economy. Less developed economies could subscribe to a basic model of taxpayers' rights consistent with the level of development of their economy and their tax system. Given, the conclusions of the jurisprudential and human rights literature, this would likely prove more acceptable, provided that it was not perceived as a slight on less developed economies.[79] It would also mean that development of taxpayers' rights might be possible in developing countries, where limits on administrative capacity, cost and political constraints would make major tax reform unlikely.[80]

An advantage of this approach would be the scope for wider acceptance and inclusion. This point is explored further below in Chapter 3, which discusses the interpretation of a model. Suffice to say that using a two-tiered model allows each jurisdiction to implement the proposed rights in the context of its own tax system. It can then cater for cultural, political, social, economic and other factors

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77 Above n. 75.

78 For example, the 2006 Report, ibid., p. 10, which recognizes the impediments to information exchange found in domestic laws that will lead to different levels of compliance.

79 Politics of negotiation of differing standards.

80 *See generally*, D. Newbery and N. Stern (eds.), *The Theory of Taxation in Developing Countries* (New York, OUP/World Bank, 1987) and specifically, 200 *et seq*; R.M. Bird, 'Administrative Dimensions of Tax Reform' (2004) 10 *Asia-Pacific Tax Bulletin* 134; and C. Grandcolas, 'Management of the VAT — Improving the Level of Compliance Using Performance Indicators' (2006) 12 *Asia-Pacific Tax Bulletin* 6.

specific to that jurisdiction in the implementation and application of the rights. This is consistent with the approach of recent human rights literature, discussed above. Nonetheless, the basic rights are sufficiently universal to allow recognition. This is of particular interest to taxpayers acting globally and countries seeking to improve foreign investment.[81]

VI. Disadvantages and advantages of a two-tier model

It could be argued that a two-tier model encourages states to adopt the basic level of protection for taxpayers rather than aspiring to the more advanced level. If an approach were taken between the two, developing nations would have more to aspire to. This argument is attractive in that it might lift the level of protection in some jurisdictions, but it is more likely to lift the level too high for developing countries to participate and to set it too low for developed countries to see it as having value.

Another argument is that having a two-tier model will make it unlikely that nations will subscribe to or incorporate the model. Acknowledging that it subscribes only to a basic model might be a politically sensitive issue for a country that is seeking to demonstrate the sophistication of its legislative and administrative systems. Developed jurisdictions may not see it as relevant to consider a model, given their other treaty commitments.

A third argument is that it is easier to encourage states to adopt a common international standard. It provides a benchmark. Adoption by a number of states puts pressure on others to follow suit. By breaking the model into two, there is less clarity on the benchmark. States have a choice as to which standards they will apply even where they choose to use the model as a basis for their tax rules.

These perceived disadvantages of a two-tier system relate more specifically to the adoption of an international treaty, charter or standard. In contrast, the aim of a model for taxpayers' rights is to provide a guide to states reforming their tax systems. Tax reform, as discussed below, is endemic. Policy-makers often do look to international norms when designing changes to the tax system. A two-tier model would provide guidance at the appropriate level for particular tax systems. It would suggest rules that they could incorporate to meet best

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81 *See* the discussion in OECD, *OECD Global Forum on International Investment: Attracting International Investment for Development* (2003), <www.oecd.org>, 1 September 2006.

practice. If the model is seen as a guide rather than a prescription, it is far more likely to gain wider acceptance. As with the Model OECD Double Tax Convention,[82] over time the rules it contains may be incorporated into a large number of systems. At that point, it will become relevant to refer to it as having a more prescriptive nature, as the rules become the starting point for inter-jurisdictional negotiations on issues affecting taxpayers' rights.

The threat to nations in the taxpayers' rights arena is significantly lower than in those areas where their revenue base is threatened. Also, the pressure to adopt rights is not sourced internationally in the way it is to support minimum standards of human rights generally. There simply is not a general awareness of taxpayers' rights. For policy-makers in jurisdictions undertaking reform it is therefore unlikely to be a major political issue whether they refer to a model of taxpayers' rights and at which level. There are at least three significant advantages to a two-tier model.

First, as countries go through major tax reforms, a model provides principles that can govern the formulation of the tax rules. Consider an example of where this occurs. Two influential organizations that have significantly influenced domestic tax policy are the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (World Bank), a UN agency. Both came out of the Bretton Woods Conference in 1944.[83] The IMF was designed to act as a catalyst for economic co-operation, growth and stability within the international monetary system. One of its key roles has been to extend credit and provide economic relief to countries experiencing a wide range of financial difficulties. The World Bank makes available project and programme loans to less developed countries on preferential terms and by acting as a lender of last resort.[84] They often operate in tandem.

Both the World Bank and the IMF impose conditions on their lending and their involvement.[85] Before agreeing to involvement in a country, the

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[82] OECD, *Model Tax Convention on Income and Capital* (OECD, Paris, 2000).

[83] Articles of Agreement of the International Monetary Fund, <www.imf.org>, 5 September 2006.

[84] J. Cahn, 'Challenging the New Imperial Authority: The World Bank and the Democratization of Development' (1993) 6 *Harvard Human Rights Journal*, 159, 162.

[85] J. Gold, *Conditionality*, International Monetary Fund Pamphlet Series No. 31, 1979; M. Guitian, *Fund Conditionality: Evolution of Principles and Practices*, International Monetary Fund Pamphlet Series No. 39, 1981; International Monetary Fund, *IMF Survey Supplement*, vol. 30, 2001, <www.imf.org/external/pubs/ft/survey/2001/090101.pdf>, 5 September 2006; and A. Mody and A. Rebucci, 'Overview', in

institutions carry out an assessment of the economic and other conditions in the country.[86] From this assessment, they will make recommendations, usually economic and legal. Although, they are increasingly more extensive:[87]

> Bank-approved consultants often rewrite a country's trade policy, fiscal policies, civil service requirements, labour laws, health care arrangements, environmental regulations, energy policy, resettlement requirements, procurement rules, and budgetary policy.

In their involvement with developing nations and nations in distress, they effectively take on the role of a sovereign government when they require implementation of their conditions and recommendations.[88] Certainly, their influence on the tax systems of developing nations and, more recently, of economies in transition, reflects their sovereign role. To see this, one only has to read the technically excellent works put out by IMF and World Bank experts,[89] which are reflective of their extensive fieldwork. It is precisely in the exercise of this role and influence that a basic model of taxpayers' rights would prove beneficial.[90]

One of the clearest examples of the impact of conditionality has been the spread of a broad based consumption tax (Value Added Tax or VAT).[91] But the

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A. Mody and A. Rebucci (eds.), *IMF Supported Programs — Recent Staff Research* (Washington DC, IMF Multimedia Services Division, 2006), <www.imf.org/external/pubs/ft/seminar/2006/isp/eng/isp.pdf>, 5 September 2006.

86 Described extensively in J. Cahn, above n. 84.

87 Ibid., p. 160.

88 Ibid.

89 J.R.S. Gill, *A Diagnostic Framework for Revenue Administration*, World Bank Technical Paper No. 472 (World Bank, 2000); C. Silvani and K. Baer, *Designing a Tax Administration Reform Strategy: Experiences and Guidelines* (Washington DC, 1997), IMF Working Paper No. 97/30; V. Thuronyi (ed.), vols 1 and 2, *Tax Law Design and Drafting* (Washington DC, IMF, 1996); V. Tanzi and A.J. Pellechio, *The Reform of Tax Administration*, IMF Working Paper, WP/95/22 IMF, 1995); P. Shome (ed.), *Comprehensive Tax Reform: The Colombian Experience*, Series No. 123, IMF Occasional Papers (Washington DC, IMF, 1995); G.P. Jenkins, 'Modernization of Tax Administrations: Revenue Boards and Privatization as Instruments for Change' (1994) 48 *IBFD Bulletin*, 75; K. Theodore (ed.), *Tax Reform in the Caribbean* (Institute of Social and Economic Research, Univ. of the West Indies, Mona, Jamaica, 1992); and R.M. Bird and M. Casenegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington, D.C., IMF, 1992).

90 *See* the extensive list of Technical Assistance projects, <www.itdweb.org>, 5 September 2006.

91 A. Tait, *Value Added Tax: International Practice and Problems* (IMF, Washington DC, 1988). For the increasing trend towards the implementation of a

fiscal influence of the IMF and World Bank goes far beyond this. Whereas the influence of other institutions is severely circumscribed, that of the IMF and World Bank, within certain spheres, is almost unlimited. They deal primarily with developing countries and countries in distress. They generally attempt to implement solutions tried and tested elsewhere, but designed and modified to fit the peculiar circumstances of the project country. In this context, a model of taxpayers' rights would be extremely useful and provide a benchmark against which to measure the implementation of different tax systems. A basic model would be essential if it were to have practical application to tax systems starting from a very low base.

Formulation of a basic model for use in the design of tax systems by the IMF and World Bank could also form one of the bases for dialogue between those organizations and developing countries when considering tax policy. The international organizations have recognized the need for wider representation of developing countries in the policy dialogue. The IMF, OECD and World Bank jointly proposed *Developing the International Dialogue on Taxation*, which has continued as a dialogue involving a range of international organizations concerned with taxation.[92]

The aim of the Dialogue is to encourage dialogue, identify and share good practices, provide a clearer focus for technical assistance and avoid duplication of effort.[93] A model of taxpayer's rights would fulfil these criteria and could be the basis for the ongoing discussion on taxpayers' rights.[94] The success of the international dialogue on the policy governing taxation of electronic commerce shows how it has worked elsewhere.[95]

VAT, *see* IBFD, *Annual Report*, which publishes each year a worldwide survey of developments and trends in international taxation, <www.IBFD.org>, 7 November 2006. *See* also, e.g., 'IMF Commends VAT Introduction in Cameroon' (1999) 18 *Tax Notes International*, 1770 and 'IMF Welcomes Tanzania's VAT' (1999) 18 *Tax Notes International*, 1675. The International Tax Dialogue recognised this trend: its first conference in March 2005 focused on Value Added Taxes: <www.itdweb.org>, 1 September 2006.

92 Ibid., part II. *See* the International Tax Dialogue website, <www.itdweb.org>, 1 September 2006.

93 Ibid., part IV.

94 The papers on the strategic, planning and general principles section of the Organisation and management of tax administration section of the International Tax Dialogue website, <www.itdweb.org>, 1 September 2006, are almost all concerned to some extent with taxpayers' rights.

95 *See* the papers and history of the dialogue, <www.oecd.org>, 1 September 2006, under the topic 'Tax and Electronic Commerce', particularly the Reports, such as

There are some obvious benefits to international dialogue of this kind. It avoids duplication. It provides a forum to develop international consensus at the governmental level. The discussion of international tax policy will be more informed given the range of participants and their particular perspectives. The dialogue may act as a catalyst to improve practical co-operation between tax administrations. It is in this area that a basic model for taxpayers' rights could be highly effective.

A second advantage of a two-tiered model of rights is that the international stage is now crowded with individuals, organizations and different levels of government, each with their own agenda. Fluidity is a hallmark of the set and characters. It is underpinned by the growing international economic inter-relationship. The sheer volume and extent of world trade and international investment in all its forms ensure that the livelihoods of most people are inextricably linked to it. One of the most difficult challenges is how the individual government units should manage their revenue collection in this environment.

Tax systems have become increasingly sophisticated. They are subject to constant change and development, as they have to come to terms with evolving economic imperatives. Managing that change and development includes managing the significant pressures on the system both internally, within revenue compliance and administration, and externally, for example, with the development of electronic commerce.

The very diversity of experience within each system requires the application of general principles to bring order out of impending chaos. That order is more effective if it encompasses both the internal and external elements. It is here, as different units of government seek to carve out for themselves niches that allow them to operate independently as taxing agents within the context of an increasingly integrated world order, that we see the level of that integration. Where economic or relational inter-dependence is strongest, there is most convergence between tax systems, and principles have their widest acceptance. Where inter-dependence is weaker, there is less convergence of tax systems and the general application of accepted principles.

This explains in part the growing influence of supranational organizations and the success of central governments in controlling the taxing powers in federal systems. But it also explains in part the limitations of those organizations and governments. The deeper the level of interaction that must or does occur between different authorities, the greater the pressure to reduce

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OECD, *Taxation and Electronic Commerce: Implementation of the Ottawa Taxation Framework Conditions — 2003 Report*.

transaction costs between their respective tax systems.[96] Where there is little interaction, the pressure is correspondingly reduced.[97]

This interaction and, to a limited degree, convergence, is most obvious between OECD countries in the area of tax administration. This will be discussed in more detail in Chapter 7 in the context of information exchange. But there are numerous other cases, from transfer pricing[98] to harmful tax competition,[99] where common or similar administrative approaches and systems are being put in place to facilitate revenue administration, collection and protection of jurisdictional revenue bases. An advanced model of taxpayers' rights is consistent with and could assist this cooperation.

A third advantage to a two-tiered model of taxpayers' rights relates to trade and investment. With the expansion of international trade comes the associated increased focus on investment flows. Investment is critical to the health of an economy and tax systems are designed to attract foreign investment.[100] To do that consistently, it helps if the system is seen to operate with integrity and protect the basic rights of the investor.

The level of sophistication of the tax regime significantly alters the level of taxpayer protection expected to operate within it. For example, a foreign investor would not require as high a level of taxpayer protection in a simple regime that does not include taxation of capital gains, has limited taxation of foreign sourced income, does not have a special regime governing the taxation of transfer pricing and derives a significant portion of its revenue from indirect

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96 For a detailed discussion of the transaction cost arguments *see* R. Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics* 1, and R.A. Posner, *The Economics of Justice* (Cambridge MA, Harvard University Press, 1983).

97 Which is why most countries only negotiate double taxation agreements with their trading partners.

98 For example, where the Pacific Association of Tax Administrators (PATA) developed a standard package of documentation for taxpayers applying for an advance pricing agreement on transfer pricing involving those jurisdictions. *See* IRS, *Pacific Association of Tax Administrators* (PATA) *Transfer Pricing Documentation Package*, found under 'transfer pricing', <www.irs.gov/businesses/international>, 5 September 2006.

99 Discussed above.

100 For example, *see* A. Shu and J. Yang, 'China enacts Incentives to encourage Information Technology, Innovation and Developments' (2000) 20 *Tax Notes International*, 829. *See also*, L. Zaheng, L. Wang and M. Gould, 'China establishes special trade zones to encourage export operations' (2001) 22 *Tax Notes International*, 589. For a wider discussion, *see* S. Bucovetsky, 'Rent Seeking and Tax Competition' (1995) 58 *Journal of Public Economics*, 337.

taxation. This is mainly because the simpler the regime, the less likelihood that there would be conflict between the investor and the revenue authorities at a sophisticated level. For example, there is unlikely to be significant demand for revenue rulings or for special procedures governing transfer pricing audits involving more than one jurisdiction. However, the investor would be anxious to ensure that there was basic taxpayer protection and security of investment from arbitrary intervention. For example, an investor would be concerned if there was no right of appeal from the decision of a revenue official or if there were no limits on the rights of search and seizure by revenue officials.

Clearly, models of taxpayers' rights will provide guidance for revenue authorities in determining the minimum expectations of foreign investors. They will also assist advisers to foreign investors in analysing all the factors affecting the investment decision.

On balance, provided that a model is not put forward as a rigid international standard, a two-tier approach has merit. It allows flexibility based on relative sophistication and provides appropriate guidelines for both developed and developing economies.

VII. Is a model of rights realistic?

The concept of taxpayers' rights raises immediate concerns as it sets itself up as a counterpoint to the exercise of the taxing powers of the state. Taxpayers' rights are generally expressed in terms of an obligation on the state to act in a certain way or as a limitation on its powers to make, administer, collect or enforce the tax laws. As discussed above, the power to tax is fundamental to the operation of the state. Without taxation of some kind,[101] a state that recognizes property and liberty could not function unless it has its own independent source of funds.[102] Any limits on taxing powers are viewed with suspicion; hence the early evolution of the margin of appreciation in international tax treaties with respect to tax matters.[103]

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[101] Even low tax countries such as Bermuda and Nauru require some form of tariff, excise or other impost to provide funds for the operation of the government.

[102] It could be argued that state ownership of oil wealth in countries such as Brunei and Saudi Arabia provides an example.

[103] L. Catá Backer, in 'Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union' (1998) 12 *Emory International Law Review*, 1331, explores the tensions between what he sees as 'the craving for normative enforceable uniformity within Europe' (1332) and the retention by nation-states of 'the

A. Changes in approach to the limits

On a traditional analysis, it would seem fair to say that states have little interest in accepting formal limits on their rights to tax. It has been left largely to the state to determine the appropriate delicate balance between the wishes of the individual and the utilitarian greater good of the majority.[104] But this is changing, because the operating framework is changing. What is our operating framework? There are different levels of political power and authority. The lower the level the more limited is the jurisdiction. Ultimate sovereignty supposedly rests in the nation state. Yet, this sovereignty is limited increasingly by binding agreements at the supranational level.[105] At all levels, the framework is determined in part by the formal legal and administrative authority vested in each component, whether an international organization, a national government, a state or provincial government, a city or town council or some other entity vested with civic authority.

However, there is a further vital dimension to the operating framework: the voluntary and involuntary cooperation that provides an informal counterpoint to the exercise of formal legal and administrative authority. Sometimes it is based in delegated authority. For example, where the revenue authorities in the

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ultimate power to impose norms and to implement law within their respective territories' (1333). It is a useful analysis of the broader context that gives rise to states exploiting margins of appreciation in treaties and the underlying rationale for their doing so. The logic as applied to the protection of national sovereignty extends specifically to taxation, which is one of the areas most fiercely protected. *See further,* H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (The Hague and London, Kluwer Law International, 1996) and F. Jacobs and R. White, *The European Convention on Human Rights* (Oxford, OUP, 1996), p. 258.

104 *Handyside v. United Kingdom*, A24 (1976); (1976) EHRR 737.

105 Although L. Catá Backer, above n. 103, argues that principles such as the European subsidiarity concept ensure that 'supranational entities are little more than well-organized networks of legal obligations among sovereign states' (1335). He goes on to state that, 'subsidiarity ultimately rejects the independent power of the networks of obligations to impose normative limits on the power of the nation, except to the extent the nation-state permits it'. His arguments focus on the limits of supranational bodies to impose normative limits. Taking it from the opposite perspective, although nation states are careful to limit inroads into their sovereignty, the network of legal obligations (albeit in the taxation area subject to wide margins of appreciation) does result in the slow but incremental erosion of sovereignty.

Pacific Association of Tax Administrators developed a standard package of documentation for taxpayers applying for an advance pricing agreement on transfer pricing involving member jurisdictions,[106] or where the Australian state of Queensland negotiates special state tax concessions to persuade a multinational company to establish its regional headquarters there.[107] Sometimes it simply represents the exercise of economic or other power. An obvious example (above) is where the members of the OECD forced a number of small nations to comply with OECD requirements designed to prevent those nations from allowing money laundering or practising tax competition.

The whole provides a complex matrix of vertical and horizontal relationships. Advances in trade, technology and communication have exacerbated the complexity as different players can now relate to other players at different levels in a way that was not possible until recently. Individual taxpayers in one jurisdiction now routinely interact with authorities at all levels in another jurisdiction that they are targeting for direct investment.[108] Where supranational organizations were once the preserve of member governments, the OECD Committee on Fiscal Affairs' (CFA) Technical Advisory Groups (TAGs) on aspects of the taxation of Electronic Commerce included both individual taxpayers and representatives from non-member jurisdictions.[109]

The sheer scale of tax administration ensures a level of interaction with the revenue authority at all levels that 100 years ago would have been simply unimaginable. Revenue authorities increasingly have contact in some form with almost every adult and many children.[110] It is in this context that the

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106 Above n. 98. *See further*, M. Markham, *The Transfer Pricing of Intangibles* (The Hague, Kluwer Law International, 2005), ch. 6.

107 Australia Tradecoast, *Australia Tradecoast Case Study: Virgin Blue*, <www.australiatradecoast.com.au/docs/Virgin_Blue.pdf>, 6 November 2006. *See also* Australia Tradecoast, <www.australiatradecoast.com.au/AboutAustraliaTradeCoast/faqs.aspx>, 6 November 2006.

108 *See, e.g.*, K. Messere, F. de Kam and C. Heady, 'Tax Aspects of Fiscal Federalism' in K. Messere, *Tax Policy: Theory and Practice in OECD Countries* (Oxford, OUP, 2003), ch. 5.

109 *See further* on business involvement, J. Owens, 'Taxation Issues in Electronic Commerce: Developing a Partnership between Business and Government', (1999) 18 *Tax Notes International*, 1587, i. 16.

110 P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001), p. 2.

balance between the interests of taxpayers and the state is starting to shift in favour of the taxpayer. For the complex and interdependent relationships between taxpayers and states to flourish it is no longer possible to rely on the traditional command model of tax administration.[111] That this is widely recognized is seen in the proliferation of charters or statements of taxpayers' rights.[112] A Model of taxpayers' rights is therefore realistic in a changing world.

B. National limits

At the national level, tax collection is obviously important and any actual or perceived threat to tax collection is taken seriously. In most jurisdictions, legislation providing the financial means for the government to operate warrants favourable legislative process (the powers of supply in common law jurisdictions).

This special treatment is carried through into the procedural application and operation of the law. The power of the courts to review the operation of the tax system is specifically restricted. Australia, the UK, Canada and Japan provide examples. In Australia, administrative law governs the legality of process and the rights of judicial review of administrative actions are codified in the Administrative Decisions (Judicial Review) Act 1977 (Cth) (the Act). The common law rights remain, but in most cases they are now found in a clearer form in the Act.[113] Under Schedule 1(e) of the Act, any decision connected with the making or amending of tax assessments or the calculation of tax or duty is excluded from the jurisdiction of the Federal Court. The availability of judicial review of decisions in tax matters is as limited in the UK. Saunders states that in tax matters, 'potential applicants for judicial review should normally use grievance procedures and the Ombudsman and 'any system of dispute resolution available before using judicial review as the ''remedy of last resort'''.[114]

Note: Highlighted text only we removed text to be retained

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111 *See generally*, V. Braithwaite, above n. 17.

112 *See further*, International Tax Dialogue, above n. 94.

113 *See also* Administrative Decisions (Judicial Review) Act 1977 (Cth), (the AD(JR) Act), s. 10.

114 I. Saunders, 'Judicial Review: Successes for the Taxpayers' [1997] 2 *British Tax Review*, 105, 106, with the quote from S. Cragg, 'Lord Woolf and Judicial Review' (1996) 1(4) *Judicial Review.*

In Japan, the Gyôsei Tetsuzuki Hô[115] (Administrative Procedure Law (APL)) states in Article 1:[116]

> The aim of this Law is, in relation to dispositions, administrative guidance and notifications, to aspire to greater fairness and transparency . . . in administrative management by providing for common matters, and by these means to contribute to the protection of the rights and interests of the Japanese people.

Ishimura states that, 'the operation of the APL has been almost entirely excluded in the area of tax administration'.[117] There is specific exclusion from application to taxation of the principles governing administrative management and the general principles for administrative guidance.[118]

Even where states introduce charters of rights, the rights of taxpayers are restricted. In Canada, the applicability of the Canadian Charter of Rights and Freedoms[119] (the Charter) to taxation matters was considered in *Thibaudeau v. Canada*[120] and it was found that the Income Tax Act was subject to the Charter. However, the courts have been unwilling to find taxation laws contrary to the provisions of the Charter, as the very essence of the tax law is 'to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests'.[121] Philipps argues that, 'Gonthier J relied on the 'special' status of tax law to support a narrower reading of the equality guarantee itself, excusing the government from having to show that the provisions are reasonably justifiable on policy grounds'.[122] Whether or not the courts use the 'special status' of tax law to read down Charter rights, the critical point is that tax law has this 'special status'.

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115 Law No. 88 of 1993. *See* K. Ishimura, 'The State of Taxpayers' Rights in Japan' in D. Bentley, (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998), p. 235.

116 Translated by K. Ishimura, ibid.

117 Ibid., p. 236.

118 Ibid.

119 Constitution Act 1982, Part I; Canada Act 1982 (UK) 1982, Sch. B, c 11, effective 17 April 1982.

120 *Thibaudeau v. Canada*, [1995] 1 CTC 212; 95 DTC 5998 (SCC).

121 Ibid., per Gonthier J, p. 392 (CTC) discussed by J. Li, 'Taxpayers' Rights in Canada' in D. Bentley, above n. 115, p. 130.

122 L. Philipps, 'Tax Law: Equality Rights: *Thibaudeau v. Canada*' (1995) 74 *The Canadian Bar Review*, 668, 675.

However, these legal restrictions in many countries have been balanced by a mix of legislative and administrative limits on the power of the state in taxation matters. Australia, Canada and the UK have introduced administrative statements of taxpayers' rights. Limits on the state in Japan are less obvious,[123] but even there, for example, the tax authorities have introduced a system of advance pricing agreements to provide certainty to taxpayers in transactions involving transfer pricing and recognize the importance of securing taxpayer co-operation, participation and understanding in tax matters.[124] In a state where the limits are slow to change, it supports the analysis above that changes take place where there is interaction between different systems. It is inevitable in the context of international trade and the desire to create an attractive location for foreign investment.

In this context there are two significant areas where a model can contribute within national limits. First, developed countries have an ad hoc approach to taxpayers' rights. The Taxpayer Bills of Rights in the United States are hardly bills of rights as they are normally understood. Rather, they constitute piecemeal amendments to the Internal Revenue Code. The same position is reflected in most OECD countries, where taxpayers' rights are found spread across tax and other legislation. This is why lists of administrative rights are used to draw the threads together. Second, for developing countries and countries in transition, there may be opportunities to redraft their revenue laws. As such, it presents an opportunity to identify the basic rights that any system should provide to its taxpayers, and to include them in the law. Drafters will not find these rights clearly identified in the tax laws of any OECD country, to use as a precedent. Accordingly, it makes sense to draw up a list of those rights that should be found in any system.

Historically, it may have been of little consequence to introduce a model of taxpayers' rights. The national exclusions seemed too wide-ranging for it to have had any effect. But the changes in approach in recent decades have completely altered the way tax systems are administered. This will be explored

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123 K. Ishimura, above n. 115.

124 Individual Circular: On the Advance Recognition of Arm's Length Price Calculations on Intercompany Transactions [Kobetsu Tsûtatsu: Dokuritsu-kigyô-kan Kakaku no Santei-hôhô-tô no Kakunin ni Tsuite] (1987 Sachô 5-1 Gai-2-ka Kyôdô). *See* K. Ishimura, ibid., p. 243 and PATA, above n. 98. The changing focus of the Japanese Tax Administration can be seen in Art. 4, NTA, *An Outline of Japanese Tax Administration*, <www.nta.go.jp/category/outline/english/2741/contents.htm>, 5 September 2006.

in detail in later chapters. A Model of taxpayers' rights is realistic in the national context.

C. International limits

The position is the same at the international level. There is a history of ensuring that the possibility for interference in tax matters is limited. In most multilateral treaties that might otherwise affect taxation, it is specifically excluded. The WTO provides an example.[125] Although, the focus is on allowing nations to grow through competitive advantage in a free international market[126] and more than 140 nations in the WTO have agreed over time to significant reductions in tariffs and the abolition of quotas,[127] the history of the General Agreement on Tariffs and Trade (GATT) has been to exclude taxation from its ambit.[128] The non-discrimination requirement in the GATT does extend to domestic taxation, which cannot be used as an instrument to protect domestic goods.[129] The General Agreement on Services (GATS) also includes a non-discrimination clause, but has exceptions for existing tax treaties and domestic tax laws.[130]

However, the WTO provides an excellent example of how the international trade environment can reduce the apparent limitation on bringing taxation within the scope of an international treaty. Unlike in international tax law, international trade law has managed in its agreements to introduce various forms of adjudication, including binding adjudication. This is assisted by the multilateral nature of the agreements.[131] In the case of US Foreign Sales

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125 Marrakesh Agreement Establishing the World Trade Organization, Legal instruments — Results of the Uruguay Round, vol. 1, 33 ILM (1994), p. 1125, p. 1144. *See further* <www.wto.org>, 5 September 2006 and J.H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* (2nd edn., Cambridge, MIT Press, 1997).

126 For an analysis of competitive advantage, *see* M.E. Porter, *The Competitive Advantage of Nations* (New York, Free Press, 1998), particularly ch. 12 on Government Policy.

127 GATT, 30 October 1947, 55 UNTS 194, Arts. II and XI.

128 Discussed in A.C. Warren Jr, 'Income Tax Discrimination against International Commerce' (2001) 54 *Tax Law Review*, 131.

129 GATT, 30 October 1947, 55 UNTS 194, art. III and, A.C. Warren, ibid., p. 142.

130 Marrakesh Agreement, above n. 126, p. 1168, Arts. XIV, XVII and XXII.

131 A.C. Warren, above n. 128, p. 146.

Corporations (FSC),[132] the Reagan administration introduced special rules so that a FSC, with an adequate foreign presence, could defer tax on a portion of its income. It was designed to give US exporters similar concessions to those given under consumption tax regimes. In 1997, the EU successfully challenged the rules under the WTO Agreement on Subsidies and Countervailing Measures. The Appellate Body upheld the ruling. In 2001, the EU successfully challenged the successor legislation to the FSC, the Extraterritorial Income Exclusion Act of 2000 and this was upheld on appeal.[133]

Stephan suggests that this example shows that the WTO does constrain US taxation laws.[134] He argues that the US would be concerned about the economic consequences of failure to comply with WTO rulings,[135] as continued growth in the global economy and confidence in it may be undermined by the instability in the world trading system caused by a failure to comply.[136] This is borne out by the fact that both rich and poor countries comply with most WTO rulings.[137] Confidence that the benefits of WTO membership outweigh the costs, including the threat of having to comply with adverse adjudication, is seen in the membership growth of the WTO.[138] As countries comply with WTO rulings, that act of compliance also reinforces the weight of those rulings under public international law and entrenches their position as an ongoing constraint on domestic tax policy as it is affected by those rulings.

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132 World Trade Organization, *Report of the Panel*, United States-Tax Treatment for 'Foreign Sales Corporations,' WT/DS108/R (8 October 1999) and World Trade Organization, *Report of the Appellate Body*, United States-Tax Treatment for 'Foreign Sales Corporations', WT/DS 108/AB/R (24 February 2000). For a detailed review, *see* P.R. McDaniel, 'The Pursuit of National Tax Policies in a Globalized Environment: Principal Paper: Trade and Taxation' (2001) 26 *Brooklyn Journal of International Law*, 1621.

133 For coverage *see*, *e.g.*, 'WTO Panel Hands US Fourth Loss Over FSC Replacement Law' (2001) 25 *Tax Notes International*, 234; 'Parties to Resolve FSC Dispute through Negotiation, says Former US Trade Rep' (2002) 25 *Tax Notes International*, 970; and 'Bush Promises WTO Compliance, Fails to Lay Out Timetable' (2002) 26 *Tax Notes International*, 700.

134 P.B. Stephan, 'American Hegemony and International Law: Sheriff or Prisoner? The United States and The World Trade Organization' (2000) 1 *Chicago Journal of International Law*, 49, 66.

135 Ibid.

136 Ibid., 67.

137 Ibid., 68.

138 Ibid.

Exclusions in human rights treaties allow states a 'Margin of Appreciation' in matters critical to the existence and operation of the state. Essentially, in revenue matters, the state is allowed significant freedoms in the legislation and operation of the tax system. For example, Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) as amended by Protocol No 11 states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payments of taxes or other contributions or penalties.

This would seem to make any model of taxpayers' rights superfluous. Yet, in *Sporrong and Lönnroth v. Sweden*,[139] the European Court of Human Rights interpreted Article 1 to mean that there must be a fair balance between the public interest demands of the community and the requirement to protect individual rights.[140] The margin of appreciation gives the state broad powers to secure the payment of taxes, but the exercise of the right of sovereignty must be fair, follow procedural safeguards and uphold the principle of proportionality.[141] Although Jacobs and White argue that, 'nowhere is the margin of appreciation wider than in the area of taxation',[142] Persson-Österman demonstrates that, particularly in procedural areas, the ECHR has strengthened taxpayers' rights.[143]

The European Union (EU) provides another example of how convergence between systems creates a dynamic environment for the recognition of interests. This is evident in the rules governing taxation. Theoretically, the EU has

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139 Series A, No. 52, [1982] ECHR 5, 18.

140 Followed in *James v. United Kingdom*, Judgment of 21 February 1986, Series A, No. 98; (1986) 8 EHRR 123, para. 50.

141 *Hentrich v. France*, Judgement of 22 September 1994, Series A, No. 296-A; (1994) 18 EHRR 440, para. 39.

142 F. Jacobs and R. White, above n. 103, p. 258.

143 R. Persson-österman, 'Human Rights in the Field of Taxation: a view from Sweden' (1999) 2 *The Cambridge Yearbook of European Legal Studies*.

limited control over the direct taxing powers of individual states.[144] But the European Court of Justice (ECJ) has been quick to strike down impediments to the implementation of the EC Treaty.[145] Raventós puts it forcefully:[146]

> The most serious accusation that has been made against the ECJ is that it is undermining the taxation powers of the Member States, in other words, it is attacking the sovereignty of those Member States. . . . As the *Schumacker* decision stated: 'as Community law stands at present, direct taxation does not as such fall within the purview of the Community' but, and this is the point, 'the powers retained by the Member States must nevertheless be exercised consistently with Community law'. Where national tax provisions coincide with Community law, then all is well; where they do not, Community law must prevail.

The development of taxpayers' rights by the ECJ has been significant and much of this jurisprudence is analysed in more depth in later chapters. That protection of individual taxpayers was not the primary intention of the ECJ, but rather to take forward the vision of the EU as contained in the Treaty,[147] does not detract from the effect. It rather underlines the point made above, that where economic or relational inter-dependence is strongest, there is most convergence between tax systems, and principles have their widest acceptance. The jurisprudence of the ECJ provides a basis for both many of the principles underlying, and much of the substance within, a model of taxpayers' rights. It also highlights the need, in the context of significantly increased international trade and investment, for consistent treatment of taxpayers' rights between jurisdictions.[148]

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144 Under Articles 90 to 93 of the EC Treaty, as compared with its powers over indirect taxation. *See generally*, L.W. Gormley, *EU Taxation Law* (Richmond, Richmond, 2005), ch. 1.

145 *See* R. Persson-Österman, above n. 143; M. Buquicchio-de Boer, above n. 21; C.O. Lenz, 'The Jurisprudence of the European Court of Justice in Tax Matters', (1997) 2 *EC Tax Review*, 80; and S. Raventós, 'Recent Income Tax Cases before the European Court of Justice: Impact on Future Tax Policy in Europe' (1998) 38 *IBFD Bulletin,* 336.

146 Ibid., *IBFD Bulletin*, 339 and quoting *Finanzamt Kôln-Alstadt v. Schumacker*, [1995] ECR I-225.

147 J. Bengoetxa, *The Legal Reasoning of the European Court of Justice* (Oxford, OUP, 1993), p. 80.

148 A. Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries — Have New Zealand Taxpayers Been ''Short-Changed''?' (1999) 32 *Vanderbilt Journal of Transnational Law*, 1346, 1347.

D. Conclusion

A model of taxpayers' rights is both realistic and possible. Currently the rights are disparate and are interpreted differently internationally and in individual jurisdictions. However, there has been sufficient convergence in recent decades for principles that have become widely accepted to be included in a model that will reflect the practices of many jurisdictions and act as a guide for others.[149]

Baker and Groenhagen make a strong statement for a model:[150]

> New proposals to extend massively the exchange of information between tax authorities around the world require a more systematic protection of taxpayers' rights. There is always room for improvement and this is where the process of standard-setting comes in. By examining best practice among existing countries, by identifying problems with existing practice, rights can be enhanced in a way which is both beneficial to taxpayers and, ultimately, to effective tax administration.

VIII. Should the model include taxpayers' obligations?

Revenue authorities are given powers to administer the tax system. These include the powers of administration, collection and enforcement. The system itself finds its basis in primary and delegated legislation, often implemented using administrative regulation. Every aspect of the administration of the tax system has a bearing on an obligation that a taxpayer owes to the state under the tax laws and regulations. This is reflected in the broad margin of appreciation given to states under international human rights treaties in the area of taxation and the positive duty to pay taxes in some treaties. For example, Article 29 of the 1981 African Charter on Human and Peoples' Rights states that each individual has a duty 'to pay taxes imposed by law in the interest of the society'.[151] A taxpayer's duties are comprehensive.

A model of taxpayers' obligations would therefore constitute a model tax code, or at least a model tax code governing the administration of the tax system. There may well be good reasons for devising such codes. Hussey

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149 A. Sawyer, ibid. made one of the first calls for an international statement of taxpayers' rights in one of the seminal articles on the topic.

150 Above n. 110, p. 5.

151 Text in P.R. Ghandi, above n. 45, p. 332.

and Lubick have done just that with their *Basic World Tax Code and Commentary*.[152] Thuronyi's wide-ranging two-volume *Tax Law Design and Drafting*, based broadly on the experience of the IMF in developing countries, provides much useful guidance on the critical elements of such a code.[153]

However, to state it in these terms could be to misinterpret what proponents of the inclusion of taxpayers' obligations in any model are saying. The Australian Taxpayers' Charter includes a number of 'taxpayer obligations'.[154] They set out in simple terms the culture of voluntary compliance that should underlie the tax system. Taxpayers are expected to:[155]

- be truthful in dealing with the ATO;
- keep records in accordance with the law;
- take reasonable care when preparing tax returns and other documents and in keeping records;
- lodge tax returns and other required documents or information by the due date;
- pay taxes and other amounts by the due date and
- be co-operative in dealings with the ATO.

Most of the obligations are mandatory, supported by the law. Others, such as the expectation that taxpayers will treat ATO staff with courtesy and consideration are simply a statement of accepted social behaviour. It reflects the emphasis by the ATO and other revenue authorities that have published similar charters on encouraging a culture of voluntary compliance. This approach is consistently taken by the ATO. For example, the Australian Commissioners of Taxation often express this view in their speeches:[156]

> The rule of law argument is a distraction or a 'straw man' to the extent that it is put to preclude recognition of the distinct value of taxation. It is a clinical debating point that fails to recognize that attitudes and values invariably affect the choices people make, their preparedness to push the boundaries and the way laws are applied,

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152 W.M. Hussey and D.C. Lubick, (eds.), *Basic World Tax Code and Commentary* (2nd edn., Arlington Va, Tax Analysts, 1996).

153 V. Thuronyi, above n. 89.

154 Australian Taxation Office (ATO), *The Taxpayers' Charter*, <www.ato.gov.au>, 1 September 2006.

155 Ibid.

156 M. Carmody, Australian Commissioner of Taxation, 'Ethics and Taxation', speech to the Edmund Rice Business Ethics Forum (Sydney, 28 October 1999), p. 2.

> ruled on by the courts and, indeed, framed. This is the true nature and influencer of ethical behaviour. It is about standards and values set by community culture, which in turn directly influence the decisions and behaviour of its members.

It is appropriate that published charters should include statements of taxpayer obligations. They aim at encouraging voluntary compliance and are used both for information and to put forward the views of the revenue authorities. There are now many examples to choose from.

The OECD Centre for Tax Policy and Administration has issued a series of practice notes for tax administrations. In its *Principles of Good Tax Administration*,[157] it identifies as the main role of revenue authorities: to ensure compliance with the tax laws and to focus on voluntary compliance. In its practice note, *Taxpayer Rights and Obligations*,[158] it stresses the importance to voluntary compliance of an understanding of basic obligations:

> There is a set of behavioural norms expected of taxpayers by Governments. These expected behaviours are so fundamental to the successful operation of taxation systems that they are legal requirements in many, if not most, countries. Without this balance of taxpayer rights *and* obligations taxation systems could not function effectively and efficiently.

The practice note goes on to identify as critical, taxpayer obligations to be honest, co-operative, to provide accurate information and documents on time, to keep records and to pay taxes on time. Essentially, it is the same as the ATO's list.

However, the purpose of a model of taxpayers' rights is different. It aims to identify basic principles that should underlie any tax system and to provide a consolidated list of the most important rights that it should contain. In reality, the rights will be found across the system in different forms and with different enforcement mechanisms appropriate to that particular system. A published charter for taxpayers is informational and educational and directed at taxpayers to encourage voluntary compliance. It comprises a summary of the major rights and obligations of which taxpayers should be aware. The model, in contrast, provides guidance to policy makers as to whether any rights that

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157 OECD Committee of Fiscal Affairs Forum on Strategic Management, GAP001 issued 25 June 1999 and amended 2 May 2001, p. 3.

158 OECD Committee of Fiscal Affairs Forum on Strategic Management, GAP002 issued 29 October 2003.

should be in place within the tax system are missing. It also provides guidance as to the content of rights and enforcement mechanisms that may be suitable. To include obligations for educational purposes in such a model is inappropriate because the target audience is different. It is the role of the revenue authorities to develop such material in the context of their own system. Indeed, to ensure completeness, a model designed for policy makers could include obligations, but it would require the formulation of a complete model code of tax administration. That may be beneficial, but it is not necessary as a first step.

To illustrate, Thuronyi's edited work, *Tax Law Design and Drafting*, identifies as foundations for any tax system the legal framework for taxation and the law of tax administration and procedure.[159] The two chapters provide an overview of the principal elements necessary to enact and operate a tax system. The focus is on taxing powers on the one hand and the execution of those powers on the other: the administration of the tax system, collection of taxes due and the enforcement of the tax rules. Both chapters include discussion of issues that underlie, or can be classified as, taxpayers' rights. The legal framework for taxation discusses the general principles of taxation and limitations on the power to make tax laws.[160] The law of tax administration and procedure includes a specific section on taxpayers' rights and refers elsewhere to limits on the power of the revenue authority, for example in its powers of investigation.[161] The work is balanced and authoritative. This volume shows that taxpayers' rights are but one element of the law governing tax administration. There is no reason why that element cannot be considered separately.

Most discussions of taxpayers' rights are derivative. They consider the balance of state power and determine to what extent that power should be limited in dealing with its citizens. This approach forms the basis for the legitimate argument that consideration of taxpayers' rights should be made in the context of taxpayers' obligations. An alternative approach is to start with the basic rights of taxpayers and consider to what extent they should be limited in the interests of the state requirement to collect taxes. Using this approach leaves it open to the state to construct whatever obligations it wishes, but sets out clearly the limits that should apply in the exercise of

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159 F. Vanistendael, 'Legal Framework for Taxation' ch. 2, and R.K. Gordon, 'Law of Tax Administration and Procedure' ch. 4, in V. Thuronyi, above n. 89.

160 Ibid., pp. 19-31.

161 Ibid., p. 103 and pp. 110-112.

those obligations. Both approaches may lead to the same conclusions. But using taxpayers' rights as the starting point goes back to the premise that taxation is itself not a fundamental good, whereas individual rights to property and liberty are.

IX. What should be the basis for rights chosen?

As discussed earlier, one of the primary considerations for inclusion of any right is a widespread acceptance. Any right should be expressed in general terms so that it can be adapted to the context of a particular system. A caveat to the OECD Practice Note, *Principles of Good Tax Administration*,[162] recognizes this and stresses the varied environment in which each revenue authority must administer its tax system, with different policies, legislative environments and administrative practices.

Chapter 3 reviews the basic principles that should underlie any tax system. Particularly in the last 50 years, these have been identified and developed to provide a broadly accepted basis for developing tax policy. The principles are relevant and helpful in the identification of a number of rights that should be included in a model. There are variances in the definition of these principles and the analysis in Chapter 3 attempts to identify the most logical application in the broader context of rights interpretation.

It is generally accepted that taxpayers' rights should be identified and interpreted as a species of human rights and in the context of the international human rights obligations into which states have entered. This was the starting point for the OECD in its 1990 survey of taxpayers' rights and obligations.[163] There is now significant jurisprudence to explore across a range of international treaties.[164]

General practice also provides a range of important rights that are included in tax systems. The OECD identified a list in its survey.[165] The Inter-American Centre of Tax Administrations/Centro Interamericano de Administraciones Tributarias (CIAT) has been active in this area. It has a

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162 Above n. 157, p. 1.

163 OECD, *Taxpayers' Rights and Obligations* (1990).

164 Discussed in P. Baker and A.M. Groenhagen, above n. 110 and P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review* 211.

165 Above n. 163.

number of useful publications that provide a source for practices among its members.[166]

The rights that flow from accepted practice in different jurisdictions include different types of right. Some are legislative and others are administrative. The method of enforcement can alter significantly the content of a right and its application. Chapter 4 provides a classification of rights and Chapter 5 examines different methods of enforcement.

Another significant factor in determining the substance of a right is its interpretation. A model of taxpayers' rights owes its significance in part, as identified above, to the increased need for international interaction. However, it has long been recognized that interpretation across borders can vary greatly.[167] In determining rights for inclusion in a model, it is also important to be aware of different legal systems, different interpretations and how they affect the general acceptance and application of the right. This is discussed in more detail in Chapter 3.

X. What is the incentive for states to adopt taxpayers' rights?

Particularly within the revenue authorities of OECD countries, opinion has changed as to the value of specific taxpayer protection, in the context of complex tax laws. Tax law complexity is a focus for criticism and simplification has become a major issue. Part of the impetus for the rewrite of legislation has come from the revenue authorities. The complexity of the transactions that has led to complex law has also placed strains on the administration and compliance functions. Revenue authorities are constantly striving to improve compliance and make revenue administration more efficient. Their research has consistently shown that in order to do this it seems helpful to have increased cooperation from taxpayers.[168] The OECD Centre for Tax Policy

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166 For example, as early as 1984, the Technical Papers of the 18th General Assembly of the Inter-American Center of Tax Administrators (Cartagena, Colombia, 21-25 May 1984), focused on Compliance with Tax Obligations. At the General Assembly held in the Dominican Republic (19 March 1996), it approved 'Minimum necessary attributes for a sound and effective tax administration'.

167 Recognised, *e.g.*, for treaty interpretation, in Arts. 31-33 of the Vienna Convention on the Law of Treaties 1969.

168 The principle was recognised in OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (1990) and is stressed in OECD

and Administration *Principles of Good Tax Administration — Practice Note* (GAP001) states:[169]

> The promotion of voluntary compliance should be the primary concern of revenue authorities. The ways by which revenue authorities interact with taxpayers and employees impact on the public perception of the tax system and the degree of voluntary compliance. Taxpayers who are aware of their rights and expect, and in fact receive, a fair and efficient treatment are more willing to comply.

Results of taxpayer compliance research within OECD revenue authorities have encouraged them to support simplification of tax laws, the introduction of self-assessment systems, and to change their traditional cultures. The revenue authorities are trying to alter the way that taxpayers perceive them.[170] The move is away from a culture of 'command and control with the automatic application of penalties for various forms of non-compliance'[171] to a responsive, service-orientation designed to build trust, support and respect in the community.[172] This involves such diverse responses as comprehensive taxpayer education, mission statements espousing friendly and efficient collection of revenue, changes in language, such as calling taxpayers 'clients', and

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Centre for Tax Policy and Administration *Principles of Good Tax Administration — Practice Note* (GAP001, 1999, amended 2001), <www.oecd.org>, 10 January 2006. A comprehensive analysis and review of the research to the late 1980s can be found in J.A. Roth, J.T. Scholz and A.D. Witte (eds.), *Volume 1 — Taxpayer Compliance: An Agenda for Research* and J.A. Roth and J.T. Scholz (eds.), *Volume 2 — Taxpayer Compliance: Social Science Perspectives* (Pennsylvania, University of Pennsylvania Press, 1989). Later research is reviewed in J. Wickerson, 'The Changing Roles of Taxpayer Audit Programs: Some Recent Developments in the Australian Taxation Office' (1994) 4 *Revenue Law Journal*, 125; J. Hasseldine, 'How Do Revenue Audits Affect Taxpayer Compliance?' (1993) 47 *IBFD Bulletin*, 424; V. Tanzi and P. Shome, 'A Primer on Tax Evasion' (1994) 48 *IBFD Bulletin*, 328; G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (Amsterdam, IBFD and ATRF, 1997); and V. Braithwaite, above n. 17.

169 GAP001, ibid., p. 3.

170 *See* e.g., V. Thuronyi, above n. 89; G.P. Jenkins, above n. 89; K. Theodore, above n. 89; R.M. Bird and M. Casenegra de Jantscher, above n. 89; and CIAT, 'Measures for improving the level of voluntary compliance with tax obligations: Technical papers and reports of the 18th General Assembly of the Inter-American Center of Tax Administrators' (IBFD, 1985).

171 V. Braithwaite, above n. 17, p. 1.

172 Ibid. This is clear from taxpayers' charters, *see* Chapter 7.

creation of a service mentality among staff. An emphasis on taxpayers' rights is part of this process.

Taxpayer lobby groups tend to dismiss the validity of the rights and responsibilities classified here as relationship building.[173] They prefer to focus on the creation of legal rights. There is no doubt that legal rights are important. However, it is also essential to remember that the revenue authorities are approaching the process from a different perspective: one that seeks to encourage compliance with the tax law.

The ATO, for example, has undertaken and supported significant research in this area.[174] Their research has shown that compliance is affected by the relationship that taxpayers have with the ATO and its officers.[175] Accordingly, it is no surprise that the Commissioner's view was that, 'The fact that the Charter encapsulates in a clear and concise way the sort of approaches we are looking for from ATO staff into the future will provide them with valuable guidance'.[176] In fact, it would be surprising if there was not significant emphasis on relationship building, given the research such as that by Stalans, who argues that:[177]

> Prior research has convincingly shown how a single experience with a rude authority lowers the recipient's support of legal authority and

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173 *See, e.g.* in Australia, 'Charting an Old Course' (1995-96) 30 *Taxation in Australia*, 265.

174 As is evidenced by the papers presented at the 1993 and 1995 ATO Research Conferences and the subsequent biennial ATAX International Tax Administration Conferences.

175 Demonstrated by the strength of taxpayer engagement in successive speeches by Commissioners of Taxation and in the annual ATO Compliance Program, <www.ato.gov.au>, 1 November 2006. *See further*, S. James, K. Murphy, and M. Reinhart, 'The Taxpayers' Charter' (2004) 7 *Journal of Australian Taxation* 336 and V. Braithwaite, 'Dancing with Tax Authorities: Motivational Postures and non-compliant Actions, in V. Braithwaite, above n.17, p. 15.

176 Quoted in 'Counter Culture', (1995-96) 30 *Taxation in Australia*, 230, p. 231.

177 L. Stalans, 'Talking about Tax Audit Experiences: The Procedural Content of Socialisation', paper presented at the Internal Revenue Service Research Conference (Washington DC, 12-13 November 1992) and quoted in J. Wickerson, above n. 168, p. 13. The concept of a breakdown in compliance by taxpayers as a result of unresolved conflicts is consistent with conflict theory. A major concern for the ATO is the fact that once taxpayers establish negative attitudes and perceptions of the ATO, they are exceedingly difficult to eliminate. 'This is partly because they support each other: negative beliefs validate negative feelings, and negative feelings make negative beliefs seem right'. D.G. Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate and Settlement* (3rd edn., New York, McGraw Hill, 2004) p. 100.

> indirectly increases non-compliance with laws. One primary objective of tax audits should be to increase the legitimacy of tax authorities and tax enforcement rather than to lower it. [When] . . . taxpayers believed their auditors were polite, communication about interpersonal treatment reinforced taxpayers' earlier acquired beliefs and support for tax authorities and tax laws. However, undignified audits are very costly for the enforcement system, especially when there is no change, or refund. The heavy cost is in terms of the loss of legitimacy in the eyes of the audited taxpayers and the other honest taxpayers who are told about the audit.

The change in the ATO culture over the 1990s reflects the ATO's view of the importance of the taxpayer relationship with the ATO. Supported by the findings of its research, the revenue authority early on supported this change in culture as a means of increasing taxpayer compliance in a way that was not possible through its traditional enforcement approach.[178] This approach impacted on the ATO's guidelines for internal conduct. A typical example is the extension of legal professional privilege to certain papers of professional accounting advisers.[179] It is purely an administrative arrangement, but reflects the ATO's concern over the public perception of its audit activity following cases that were widely publicised and in which its actions were criticised, such as the *Citibank Case*.[180] Another set of guidelines, again aimed at ensuring an acceptable public image for the ATO, acts as a code of conduct, governing the procedures to be followed by ATO auditors in the event of differences arising with taxpayers other than over the interpretation and application of the law.[181]

Increasingly, the research turned to the non-economic factors affecting tax compliance.[182] Wenzel provides a useful analysis of the importance of

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178 *See, e.g.*, A. Wirth, 'Changing Taxpayer Compliance: The Impact of Business Auditors as Service Providers' (1994) 11 *Australian Tax Forum*, 63 and R. Anderson, 'Taxpayers Are People', paper presented at the 1993 ATO Research Conference (Canberra, 2-3 December 1993).

179 ATO, *Guidelines to Accessing Professional Accounting Advisors' Papers — Guidelines* (2004), <www.ato.gov.au/corporate/content.asp?doc=/content/51665.htm>, 1 October 2006.

180 *FCT v. Citibank Ltd*, (1989) 20 FCR 403.

181 ATO, 'Code of Settlement Practice' under *Lodgement, Payment and Compliance*, <www.ato.gov.au/taxprofessionals>, 14 November 2006.

182 *See* C. Sandford, *Economics of Public Finance: An Economic Analysis of Government Expenditure and Revenue in the United Kingdom* (4th edn., Oxford, Pergamon

justice perceptions in tax compliance.[183] The idea was taken up from 1998 by Woellner et al. in a major research project that went some way towards identifying the psychological costs of tax compliance in Australia.[184] Richardson has confirmed by his research that tax fairness has an impact on compliance behaviour in the non-western jurisdiction of Hong Kong.[185]

It is clear that as the research momentum supporting the compliance benefits of being seen to uphold taxpayers' rights has grown, so too has the acceptance by the revenue authorities of the importance of taxpayers' rights. By 2002, the Australian Commissioner of Taxation could say of taxpayers:[186]

> It is early days yet and we are at the stage of identifying areas for improvement rather than solutions. However, some common themes are emerging. People are looking for recognition and acknowledgement. They want certainty, comfort and reassurance. . . . Back to the first task — delivering on the integrity and fairness promised by The New Tax System. Australians want assurance that taxes are being collected fairly across the board. . . . In the first nine months of this year, our audit programme has raised an additional $2 billion in taxes and penalties. We have moved on from the days when compliance was simply about the number of audits you did.

Press, 1992), p. 111, where he reviewed the psychic costs of compliance and G.P. Jenkins and E.N. Forlemu, *Enhancing Voluntary Compliance by Reducing Compliance Costs: A Taxpayer Service Approach*, Development Discussion Paper No. 448, Tax Research Series No. 11 (Harvard Institute for International Development, 1993).

183 M. Wenzel, above n. 17. The chapter takes the argument forward by seeking 'to offer a conceptual framework for such justice considerations based on conceptual distinctions made in social psychological justice research'. It also includes a useful taxonomy of the social psychological justice literature.

184 R. Woellner, C. Coleman, M. Mckerchar, M. Walpole, J. Zetler, in R. Fisher and M. Walpole (eds.), 'Identifying the Psychological Costs of Tax Compliance' in *Global Challenges in Tax Administration*, (Birmingham, UK Fiscal Publications, 2005), pp. 268-287.

185 G. Richardson, 'An Analysis of the Impact of Tax Fairness Perceptions on Tax Compliance Behavior in a Non-Western Jurisdiction: The Case of Hong Kong', a paper presented at the 6th International Conference on Tax Administration (Sydney, Australia, 15-16 April 2004).

186 M. Carmody, 'The Changing Tax Landscape', address to the Institute of Chartered Accountants in Australia Networking Luncheon, 3 May 2002.

Obviously, raising the revenue required by governments to fund their activities is a primary task of revenue authorities. However, it is increasingly recognized that for greater effectiveness this should be done in the context of a service-oriented relationship with taxpayers that builds a perception of the fairness of the tax system. With this backdrop, there are clear benefits to revenue authorities in upholding taxpayers' rights.

From the state's perspective there is a further important incentive to protect taxpayers' rights. Chapter 7 will illustrate the extensive powers available to revenue authorities. It is not uncommon for revenue authorities to have greater powers of search and seizure, for example, than those available to the police investigating serious crimes. Historically, democratic states prefer not to be named for abuses of any form of human rights.[187] Where the powers available to the revenue authorities are so significant, it is inevitable that without appropriate safeguards, there is a likelihood of abuse.[188] It is therefore in any state's interest to introduce the safeguards that will prevent abuse and ensure that those responsible for revenue administration, collection and enforcement retain public confidence.

The danger, where there is abuse and it is not checked, is an over-reaction by the legislature that could undermine the revenue authority. This was demonstrated in the United States in the 1980s and 1990s. There was clear evidence of abuse of power by the Internal Revenue Service (IRS).[189] However, the legislative reaction was significant and the omnibus bills known as Taxpayer Bill of Rights 2[190] and 3[191] were described by Greenbaum as 'less an attempt by the legislators to advance the rights of taxpayers than a means by which politicians improve their stature with their electorate by attacking the IRS'.[192]

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187 The UK derogated from the ECHR under Art. 15 in respect of Northern Ireland rather than be found to be in breach. Withdrawal of the derogation resulted in a number of cases where the UK was found to be in breach, to its obvious discomfort. *See* M. O'Boyle, C. Warbrick, E. Bates, D.J. Harris, *Law of the European Convention on Human Rights* (2nd edn., UK, LexisNexis, 2005), ch. 16.

188 P. Baker and A.M. Groenhagen, above n. 110, p. 3.

189 A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in D. Bentley, above n. 115, ch. 15.

190 An Act to amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections, PL 104-168, signed into law 30 July 1996.

191 An Act to amend the Internal Revenue Code of 1986 to restructure and reform the Internal Revenue Service, and for other purposes, PL 104-168, signed into law 22 July 1998.

192 A. Greenbaum, above n. 189, p. 379.

Congressman Sam Johnson from Texas, for example, made the colourful statement:[193]

> But this bill is important because the powers of the IRS to investigate and examine taxpayers are greater than any other Government agency. They are intrusive. They are into our lives, and it seems that the constitutional rights of taxpayers are always trampled upon but nothing is ever done.

It is not in the interests of taxpayers, government or the revenue authority to undermine the operation of the tax system by over-reacting to abuse of the system by any party.[194] Instead, it is in all parties' interests if abuse and the associated reaction that is likely to follow can be limited by introducing appropriate standards.

For developing economies there is a further imperative that encourages the observance of taxpayers' rights. Taxpayers' rights are generally a species of civil and political rights, although many administrative rights are not enforceable by law. Kaufmann has found that socio-economic development is closely linked to the recognition of civil and political rights.[195] Recognition of rights does not occur automatically as a country gets richer. Rather the evidence points clearly to:[196]

> the fundamental importance of positive and sustained interventions to improve governance and civil liberties in countries where it is lacking. Indeed, the fact that good governance is not a 'luxury good', to which a country automatically graduates when it becomes wealthier, means in practical terms that leaders, policymakers, and civil society need to work hard and continuously at improving these civil rights and governance within their countries.

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193 Rep. S. Johnson, 'House of Representatives Debates', from Tax Analysts, *Tax Notes Today* (Lexis database, 24 April 1996).

194 Arguably, the response of the Australian Government and the ATO to systematic abuse of the antiavoidance provisions by taxpayers in the 1980s, encouraged in part by a formalistic approach by the courts to interpretation of tax legislation, has resulted in an overly complex regulatory environment, which successive governments have since tried to clarify and simplify.

195 D. Kaufmann, 'Human Rights and Governance: The Empirical Challenge' in P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford, OUP, 2005), p. 352.

196 Ibid., where these conclusions are drawn from the evidence presented in s. 2.a.

Where they are not observed, Kaufmann's research across a range of World Bank projects shows that the likelihood of corruption and state capture by special interests is higher.[197] The better the governance of public institutions, which would include the tax administration, the better would be the development outcomes. These would also be directly assisted by measures to promote the engagement of citizens with the tax administration, which in turn is shown to encourage the control of corruption and enhancement of corporate ethics.[198]

XI. Conclusion

This Chapter began by exploring the concept that the exercise of the power to tax is an infringement of rights to property and liberty. Taxpayers' rights, as with human rights generally, provide the limit to the powers of the state. They balance the requirement to raise revenue against the rights of individuals. Even though relativism and subjectivity require any right to be adapted to its context, the human rights community has accepted that there are universal standards.

General acceptance forms the basis for a Model of taxpayers' rights. Given the increasing integration of the global economy, the perceived fairness and integrity of a tax system is becoming more important. The free flow of funds and the ease of international investment mean that governments cannot afford to ignore the rights of taxpayers. The diversity of tax systems emphasises the need for generally accepted standards.

The Chapter showed that it is generally accepted that taxpayers' rights should be identified and interpreted as a species of human rights and in the context of the international human rights obligations into which states have entered. This was the starting point for the OECD in its 1990 survey of taxpayers' rights and obligations.[199] There is significant additional jurisprudence

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197 Ibid., discussed with a case study on Bolivia in s. 3.

198 Ibid., in s. 3 and s. 5. Not surprisingly, but related indirectly to this argument, M.L. Ross, 'Does Taxation Lead to Representation', in a paper presented at an IDS Taxation Seminar (UK, 28-29 October 2002) <www.ids.ac.uk/gdr/cfs/activities/Taxation-Seminar.html>, 27 September 2006, has found that higher taxes relative to government services tend to make states more democratic over time. This suggests that where taxes are high taxpayers increase their engagement through protest or other means to ensure the delivery of government services, thereby expanding the pressure for more democratic mechanisms within government.

199 OECD, above n. 163.

to explore both domestically and internationally. It is therefore timely to consider a model set of taxpayers' rights.

As the aim is to provide a common standard of taxpayers' rights for inclusion in domestic legislation, it is unlikely that all rights in the model will be adopted as a separate code in most jurisdictions. It is only where reform of the tax system includes a new tax act that adoption of this kind will be feasible. However, elements of the model may be included as they stand into existing tax acts as a separate section. Providing the standards in the form of a guide to best practice is therefore appropriate.

It was made clear in the Chapter that the aim of this book is not to provide a comprehensive tax administration code. Such a code would cover both rights and obligations. The aim of the book is to consider one element of the rules governing tax administration: those rules dealing with taxpayers' rights.

For many jurisdictions the model will provide a standard to act as a form of quality control. Tax policy makers will be able to measure the quality of the rights afforded to taxpayers against an objective international standard. It will provide legitimacy and reassurance where policy makers are striving to achieve best practice. Domestically it will provide support for the revenue compliance programmes. It will also assist revenue authorities and the judiciary by allowing them to assess issues brought before them comparatively, taking account of decisions on similar issues elsewhere that may helpfully be decided on a uniform basis. It is likely that commonality of problems in the administration of tax systems will increase, even if the move towards harmonisation of substantive rules is slow.

The Model will need adapting to the context of each jurisdiction. States will need a degree of latitude in the implementation of the individual rights. To maintain that flexibility the Model must remain relatively broad in its articulation of standards. That said, the value of the model will depend upon a genuine attempt to implement the rights contained in it.

Using a two-tiered model provides developing countries unable to comply with all rights contained in the model the opportunity to ensure that at least the basic rights are protected in their jurisdiction. The model should therefore identify the basic rights in each article, with any additional recommended rights that should be present in all sophisticated tax systems.

The rights that flow from accepted practice in different jurisdictions include different types of right. Chapter 4 provides a classification. Some are legislative and others are administrative. The method of enforcement can alter significantly the content of a right and its application and this is explored in Chapter 5.

Taxpayers' Rights

Taxpayers' rights have come of age. They are an increasingly important element in any consideration of tax reform. Vociferous domestic interest groups and the need to reassure foreign investors will continue to drive governments to focus on taxpayer protection. The incentive to improve compliance will continue to encourage revenue authorities to improve perceptions of fairness and integrity in the administration of tax systems. A model of taxpayers' rights will provide a useful tool for all of the participants in the tax system nationally and internationally. Before classifying the rights, Chapter 3 outlines the principles that underlie a tax system generally, and therefore the rights within it, and identifies issues that arise in the interpretation of rights.

CHAPTER THREE

Principles and Interpretation

I. Introduction

Chapter 2 provided a theoretical basis for taxpayers' rights drawn from the rights literature. It developed the concept of a two-tiered Model as a timely, beneficial and realistic response to the move towards standards in a domestic and international context. Chapter 2 concluded that a Model would need to be based on generally accepted rules, which could be adapted to fit the context of individual jurisdictions.

In Chapter 2, two important limits on the Model were raised. It was noted that there are accepted principles that underlie the structure and operation of tax systems and the rules they contain. Any rights included in a Model would need to comply broadly within these principles. Chapter 2 also noted the diversity of different systems and the need to apply the Model contextually. This raises the second limit: interpretation of the Model. The two issues are connected. They are both limits on the Model. The interpretation of the rights included in the Model is aided by a clear understanding and application of the principles on which they are broadly based.

Chapter 3 notes first, that although there are accepted principles, their specific definition varies almost as often as the reports on tax systems in which they appear. The first part of the chapter draws from a number of the more important reports on tax systems a definition of the basic principles that should broadly apply to the Model. These are used to provide support throughout the remaining chapters for the rights chosen for inclusion in the Model.

The second part of Chapter 3 analyses the interpretation of Model rights once they are chosen. It acknowledges the problems of blurred definitions and

sets out a number of barriers to common interpretation. Chapter 3 concludes with a recommended initial approach to interpreting Model rights. It can be adopted in any jurisdiction and sits broadly on the principles underlying the Model.

This chapter sets the framework for analysis of taxpayers' rights, as opposed to other rights. Taxpayers' rights must be examined not only in the context of the broader rights discussion, but also in the context of the tax policy discussion.

II. Basic principles

Adoption of income taxation as a primary source of revenue by governments has a relatively short history. This has some advantages. Particularly in the last 50 years, principles, such as those identified in 1776 by Adam Smith,[1] have been developed to provide a broadly accepted basis for developing tax policy. The theoretical basis for an equitable and efficient tax system provided by such eminent scholars as R.M. Haig and H.C. Simons is widely understood if seldom adopted.[2] The more widely used principles that draw on public finance theory, but that blur the economic definition, are nonetheless relevant and helpful in the identification of a number of rights, that should be included in a model of taxpayers' rights and in providing a basis for others. Because they have been abstracted from the theory, there are variances in the definition of these principles and the analysis in this chapter puts forward one possible uniform set of definitions in the broader context of rights interpretation.

The principles underlying tax systems act as values that shape legislation. Tax reform has been one of the major trends of the last 50 years,[3] which has

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1 A. Smith and K. Sunderland (eds.), *An Inquiry into the Nature and Causes of the Wealth of Nations* (selected edn., Oxford, OUP, 1993), p. 450.

2 R.M. Haig, 'The Concept of Income — Economic and Legal Aspects' in R.A. Musgrave and C.S. Shoup (eds.), *Readings in the Economics of Taxation* (Homewood III, Irwin, 1959) and H.C. Simons, *Personal Income Taxation* (Chicago, University of Chicago Press, 1938). The unlikelihood of implementing a comprehensive income tax on net accretions to wealth led to B.I. Bittker raising the question of how to determine an optimal second-best policy in 'A ''Comprehensive Tax Base'' as a Goal of Income Tax Reform' (1967) 80 *Harvard Law Review*, 925.

3 K.C. Messere, F. de Kam and C. Heady, *Tax Policy: Theory and Practice in OECD Countries* (New York, OUP, 2003), ch. 2.

ensured that these principles are under constant review. Some reports, such as the *Carter Commission Report of Canada in 1966* have been highly influential internationally.[4] The ubiquitous presence of IMF and other international tax advisers when countries undertake serious reform of their tax systems has also assisted in some commonality of approach.[5]

Without exploring the economics underlying current approaches to taxation, it is worth mentioning the broad context in which the principles have developed. Musgrave,[6] one of the most influential public finance theorists, divides the economic functions of government into:

- Overcoming the inefficiencies of the market system in economic resource allocation;
- Redistributing income on a socially acceptable basis and
- Smoothing cyclical fluctuations to ensure high levels of employment and price stability.

To achieve its economic aims and some form of income redistribution, a government needs funding. The tax system provides that funding and the means of redistribution. The shape of the funding process rests upon the values underlying the tax system. Alley and Bentley have summarised the values set out in a number of the more important reports and other sources as follows:[7]

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4 Royal Commission on Taxation, Canada (Carter Commission) (Ottawa, Queens Printer, 1966). Its influence discussed in J.G. Head, 'The Carter Legacy: An International Perspective' (1987) 4 *Australian Tax Forum*, 143.

5 *See* the excellent technical analysis, covering the drafting experience of such experts in, *e.g.*, V. Thuronyi (ed.), vols 1 and 2, *Tax Law Design and Drafting* (Washington DC, IMF, 1996); P. Shome (ed.), *Comprehensive Tax Reform: The Colombian Experience*, IMF Occasional Paper No. 123 (Washington DC, IMF, 1995); G.P. Jenkins, 'Modernization of Tax Administrations: Revenue Boards and Privatization as Instruments for Change' (1994) 48(2) *IBFD Bulletin*, 75; K. Theodore (ed.), *Tax Reform in the Caribbean* (Institute of Social and Economic Research, University of the West Indies, Mona, Jamaica, 1992); and R.M. Bird and M. Casanegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington DC, IMF, 1992).

6 R.A. Musgrave, *The Theory of Public Finance* (New York, McGraw Hill, 1959) and R.A. Musgrave and P.B. Musgrave, *Public Finance in Theory and Practice* (5th edn., New York, McGraw Hill, 1989).

7 C.R. Alley and D. Bentley, 'Tax Design Principles: Remodelling Adam Smith', (2005) 20 *Australian Tax Forum*, 579.

Author	*Criteria*	*Title*
Adam Smith 1776[8]	Equality Certainty Convenience of Payment Economy in Collection.	Canons of taxation.
Carter Report-Canada 1966[9]	Equity Neutrality Transparency and Accountability Certainty Simplicity Flexibility	The Use of the Tax System to Achieve Economic and Social Objectives
Asprey Report — Australia 1975[10]	Fairness Efficiency Simplicity Growth Stabilization	Criteria for Tax Systems
Meade Report — United Kingdom 1978[11]	Incentives and Economic Efficiency Distributional Effects International Aspects Simplicity and Costs of Administration and Compliance Flexibility and Stability Transitional Problems	Characteristics of a Good Tax Structure
HMSO Green Paper Report — United Kingdom 1981[12]	Practicality, Fairness Accountability Cost of Administration Fiscal Dimensions Financial Control	Requirement of a Local Tax System
O'Brien Report — Ireland	Equity Efficiency	Criteria For a Tax System

[8] A. Smith and K. Sunderland, above n. 1.

[9] Canada, *Report of the Royal Commission on Taxation*, vol. 2, 'The use of the tax system to achieve economic and social objectives' (1966), ch. 1.

[10] K.W. Asprey, Taxation Review Committee, *Full Report* (the Asprey Report) (Canberra, AGPS, 1975), p. 13.

[11] Institute for Fiscal Studies [1978], *The Structure and Reform of Direct Taxation*, Report of a Committee Chaired by Prof. J.E. Meade, (Meade Report) (London, Allen and Unwin).

[12] *Alternatives to Domestic Rates* (Cmnd 8449, HMSO 1981).

Author	*Criteria*	*Title*
1982[13]	Simplicity Low administrative and Compliance Costs	
Ridge and Smith 1991[14]	Administrative Feasibility Economic Efficiency Equity and Accountability	Criteria for Local Tax
Jackson 1994[15]	Equity or Fairness Certainty Convenience of Payment Economy in Collection and Compliance Transparent.	Characteristics of an Efficient Tax System
OECD (Ottawa) 1998[16]	Neutrality Efficiency Certainty and Simplicity Effectiveness and Fairness Flexibility	Taxation Framework Conditions (for electronic commerce)
ICAEW Tax Faculty 1999[17]	Statutory Certainty Simplicity Easy to Collect and Calculate, Properly Targeted Constant, Consultation Regular Review Fair and Reasonable Competitive	Principles for a Better Tax System
James and Nobes 1997[18]	Efficiency Incentives	Principles of Taxation

[13] O'Brien Report 1982, *1st Report of the Commission on Taxation — Direct Taxation*, chaired by M.H. O'Brien.

[14] M. Ridge and S. Smith, *Local Taxation: The Options and the Argument* (London, IFS, 1991), Report Series No. 38, May.

[15] P.M. Jackson, 'Efficient Local Government Finance: The Never Ending Story', (1994) in F. Terry (ed.), *Towards Restructuring: The Dimensions of Change in Local Government* (London, Chartered Institute of Public Finance and Accountancy), pp. 55-62.

[16] Committee on Fiscal Affairs, *Electronic Commerce: Taxation Framework Conditions* (1998) also at <www.oecd.org/dataoecd/46/3/1923256.pdf>, 6 September 2006. ('Ottawa Taxation Framework Conditions').

[17] ICAEW Report 1999, *Towards a Better Tax System*, Tax Faculty: Tax Guide 2/00 (London).

[18] S. James and C. Nobes, *The Economics of Taxation: Principles, Policy and Practice* (updated 7th edn., Prentice Hall, New York, 2004).

Author	*Criteria*	*Title*
American Institute of Certified Public Accountants 2001[19]	Equity Macroeconomic Considerations Equality and Fairness Certainty Convenience of Payment Economy in Collection Simplicity Neutrality Economic Growth and Efficiency Transparency and Visibility Minimum Tax Gap Appropriate Government Revenues	Guiding Principles of Good Tax Policy

A. Deriving a common meaning

The principles overlap and some lists are more extended than others. After an analysis of the common meaning of the above principles, Alley and Bentley propose a framework of principles that encompasses most of those listed.[20] These are set out below, with a brief description of their common meaning. As in the context of the discussion of rights in Chapter 2, the principles are based on value judgments.[21] There is a core of agreed meaning, but also a penumbra of uncertainty that is explored in the different reports and analyses. If the principles are to provide a source and sometimes a measure in rights analysis it is important to identify this core of agreed meaning.

1. Equity and fairness[22]

– Taxation system design should take account of horizontal and vertical equity.

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19 American Institute of Certified Public Accountants, Inc Tax Policy, ('AICPA') *Concept Statement 1.* 'Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals' (New York, 2001), p. 6.

20 Above n. 7, p. 621 *et seq.*

21 K.C. Messere, *Tax Policy in OECD Countries: Choices and Conflicts* (Amsterdam, IBFD Publications BV, 1993), p. 110.

22 C.R. Alley and D. Bentley, above n. 7, p. 622.

– It is important that the public perceives the tax system as fair.
– Inter-nation equity should be considered for international elements.

From the taxpayer's perspective, where fairness equates to equity, there are two major elements that make an equitable tax.[23] It should treat people in similar circumstances in the same way — this is horizontal equity. It should ensure that tax is allocated fairly between people in different circumstances — this is vertical equity. There is a caveat, argued for example, in the *Asprey Report*, that measuring equity is not easy.[24]

This leads to the second principle — that the public should perceive the tax system as fair. The implementation of tax reform must often contend with aberrations that breach the principles of equity, but are nonetheless seen as fair. This is perhaps founded in self-interest rather than logic. For example, failure to tax capital gains would seem to breach both vertical and horizontal equity.[25] Yet, New Zealand has not extended its income taxation to taxation of capital gains and the public perceive the tax system as fair.[26]

As an example, Article 31(1) of the Constitution of Spain adopts both principles and requires that:[27]

> All shall contribute to the sustenance of public expenditures according to their economic capacity through a just tax system based on the principles of equality and progressiveness, which in no case shall be of a confiscatory scope.

The perceptions of fairness and equality were seen as important when the Constitution was passed in 1978. The changing nature of what is perceived as fair is seen in the requirement for progressiveness. Although income taxes remain largely progressive, the same cannot be said for the European Value Added Tax and some other indirect taxes.

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23 *Reform of the Australian Taxation System*, RATS, Draft White Paper Reform of the Australian Taxation System, (Canberra, AGPS, 1985) (Draft White Paper), p.14.

24 Asprey Report, above n. 10.

25 Asprey Report, ibid., ch. 23 and Carter Commission, above n. 4, ch. 15. *See also*, J.G. Head, 'Capital Gains Taxation — An Economist's Perspective' (1984) 1 *Australian Tax Forum*, 148.

26 *See* the review of the New Zealand system, P.M. McCaw, (Chairman), *Report of the Task Force on Tax Reform* (Government Printer, Wellington, April 1982) and recent work on perceived fairness in L.M. Tan, 'Taxpayers' Perceptions of Fairness of the Tax System — A Preliminary Study' (1998) 4 *New Zealand Journal of Taxation Law and Policy*, 59, 71.

27 Translated and cited in D.C. Hodgson, *Individual Duty within a Human Rights Discourse* (Hants, UK, Ashgate Publishing Limited, 2003), p. 173.

Despite overt and implicit support for the concept of fairness in the context of tax policy and the design of the substantive elements of the tax system, for the most part taxpayers' rights have been excluded. They are centred rather on procedural fairness (or Neumann's 'thin' concept of the rule of law discussed in Chapter 4). This may also relate back to the discussion of states' margin of appreciation in Chapter 2. In general terms states do not brook interference from individuals on matters of broad policy and design. It is seen as largely political, the province of the elected government, which must obtain approval of its actions from the legislature rather than from individuals.

The perception of fairness, however, usually relates in large part to the implementation of tax rules. The manner in which the system provides and enforces taxpayers' rights can therefore be critical to the perception of fairness. Likewise, whether a right adds to a taxpayer's perception of fairness provides a useful measure of the value of that right.

A third and different aspect of equity and fairness is inter-nation equity, or the equitable division of tax revenue between countries. This relates to taxpayers' rights in the application of negotiated or unilateral solutions to the problem. The development of general international principles has seen the establishment of an extensive international network of tax treaties, which is aimed both at preventing tax avoidance but also and most important for the taxpayer, ameliorating double taxation.[28] The tax treaty system has been supplemented by generally agreed approaches within the OECD in certain areas, such as to transfer pricing and to harmful tax competition.[29] Another multilateral example is the extensive international discussion of electronic commerce designed to overcome the perceived threat it poses to inter-nation equity by undermining source taxation.[30] General international agreement provides certainty, but leaves open the issue of whether a taxpayer can realistically rely upon such agreement in the domestic jurisdiction.

Where the fundamental policy issue underlying inter-nation equity is whether tax systems should favour residence or source based taxation, it is the rationale behind the principle that is important in the taxpayers' rights

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[28] S. Picciotto provides a comprehensive historical background in *International Business Taxation* (London, Greenwood, 1992), ch. 1-3.

[29] *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD, 1995) and, *Harmful Tax Competition: An Emerging Global Issue* (OECD, 1998).

[30] For a detailed discussion *see* R.L. Doernberg, L. Hinnekins, W. Hellerstein and J. Li, *Electronic Commerce and Multijurisdictional Taxation* (New York, Kluwer, 2001) 3.1 and 4.3.1.3.

context. The arguments for both residence and source taxation rely on different versions of economic allegiance and derivation of benefits theories.[31] Either theory suggests that it is reasonable for a person benefiting either economically or otherwise from a jurisdiction to make a contribution back to that jurisdiction. The benefits provided include the protection of property, which allows the property holder to make a contribution to the fisc, as discussed in Chapter 2. The extension of the discussion in Chapter 2 is that there is a principle flowing from inter-nation equity that a jurisdiction has a responsibility not only to protect its own allocation of revenue, but to protect the rights of its taxpayers in that process as against other jurisdictions. In other words, it is not enough for a jurisdiction simply to assert its right to tax. For the full application of inter-nation equity, it should also ensure that taxpayers required to pay tax are suitably protected in the process.

2. Certainty and simplicity[32]

- Tax rules should not be arbitrary.
- Tax rules should be as clear and simple to understand as the complexity of the subject of taxation allows, so that taxpayers can anticipate in advance the tax consequences of a transaction including knowing when, where and how the tax is to be accounted.
- There should be transparency and visibility in the design and implementation of the tax rules.

Certainty and simplicity are two of the most favoured, yet most elusive, qualities of any tax system. The first point is that rules should not be arbitrary and this goes to the heart of a rights analysis. As Adam Smith said,[33]

> 'The tax which the individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid ought to be clear and plain to the contributor and to every other person.'

A certainty that avoids being arbitrary depends on clear statutes and timely and understandable administrative guidelines that are accessible to all taxpayers.[34]

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31 Discussed further in A. Easson, *Taxation of Foreign Direct Investment* (The Hague, Kluwer Law International, 1999), p. 39.

32 C.R. Alley and D. Bentley, above n. 7, p. 622.

33 A. Smith and K. Sunderland, above n. 1, p. 452.

34 Above n. 19, p. 12.

It is fundamental to the proper operation of a tax system and underpins many of the rights discussed in subsequent chapters.

However, it is not always clear what 'certainty' means. In the context of the introduction of rules governing the taxation of electronic commerce, the EU issued a *Communication*,[35] which stated that there 'should be certainty about the rules and compliance should be made as simple as possible to avoid unnecessary burdens on business'. A *Report on the Taxation of Electronic Commerce* (UK, 1999) stated that, 'the rules for the taxation of e-commerce should be clear and simple, so that businesses can anticipate, so far as possible, the tax consequences of the transactions they enter into'.[36]

It is interesting that the EU Communication favours certainty of rules, but simplicity of compliance. Perhaps it recognizes the difficulty in making rules simple. The OECD[37] and UK approach is for the rules themselves to be both clear and simple. Even if simplicity is confined to making the rules simple to understand, it is a difficult task. The rules governing the taxation of electronic commerce are an excellent example of the difficulties of translating complex transactions into simple rules, as the rules will necessarily follow the nature of the transaction. They are often so complex that governments struggle to make them certain, let alone simple.[38] An admirable aim is to draft the rules clearly, using simple language. It will aid certainty. Even then, the rules will only become certain over time, as they are interpreted and applied. During a period of change, as the rules are adapted to cope with the transactions they govern, it is inevitable that they will appear complex. The rules will be new and there will be different interpretations of their meaning.

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35 E-Commerce and Indirect Taxation: *Communication by the Commission to the Council of Ministers, the European Parliament and to the Economic And Social Committee*: (COM(98)374final; 17/6/98).

36 Inland Revenue and HM Customs and Excise, *Electronic Commerce: The UK's Taxation Agenda* ('1999 UK Report') (London), para. 2.9.

37 The Committee on Fiscal Affairs, *Electronic Commerce: Taxation Framework Conditions* (OECD, 1998), and p. 6, <www.oecd.org/dataoecd/46/3/1923256.pdf>, 6 September 2006, stated that 'The tax rules should be clear and simple to understand so that taxpayers can anticipate the tax consequences in advance of a transaction, including knowing when, where and how the tax is to be accounted.'

38 For a useful analysis and literature survey, *see* M. McKerchar, K. Meyer and S. Karlinsky, 'Making Progress in Tax Simplification: A Comparison of the United States, Australia, New Zealand and the United Kingdom', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006).

Debate in Australia identified some of the difficulties facing policy makers in implementing the principles of certainty and simplicity. From1 July 2002, drafting tax legislation was moved from the ATO to the Department of the Treasury (Treasury). Part of the rationale was, that as Treasury was responsible for formulating tax policy, it should have more input into the translation of that policy into legislative design. Bringing policy and legislative development together aimed to produce a strategic alignment between Government policy and its implementation in legislation.

On 16 December 2004, the Australian Government issued its *Report on Aspects of Income Tax Self-Assessment*.[39] It identified the conflict between certainty in the law and simplicity in the drafting of the law:[40]

> During the 1980s and 1990s the tax legislation set out in increasing detail how the law applied in a variety of fact situations. This was seen as desirable, because taxpayers naturally want a high level of certainty as to whether and how the law will apply in their particular circumstances. While the 'detailed' approach to law does provide certainty where a taxpayer's circumstances are specifically addressed by a rule, laws designed in this way can never anticipate all the relevant circumstances for every taxpayer.
>
> As factual circumstances vary greatly, covering a wide range of circumstances in detail this is likely to result in law that is long and complicated. Complex circumstances are not easily clarified through elaboration in the law, at least not without generating legislation of inordinate length. Indeed, by introducing more boundaries between the legal concepts, potentially there is increased scope for ambiguity and uncertainty. Long and detailed law can also make it harder to find the underlying policy intent and thus increase the risk that the courts will interpret the legislation in a way unintended by Parliament. When a statute is cast in a very specific way, new circumstances can generate loopholes or inequities, requiring further specific legislation and so on.

Instead, it suggested that Treasury should use a principle-based approach to drafting of tax legislation.[41]

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39 Australian Government, *Report on Aspects of Income Tax Self-Assessment* (Canberra, 2004) <www.selfassessment.treasury.gov.au/content/_download/report/final_report.pdf>, 6 September 2006.

40 Ibid., p. 66.

41 Ibid.

The benefits of principle-based drafting are theoretically, that laws tend to be simpler and shorter, more flexible, more stable, more certain, and because draft laws are then conceptually simpler, it apparently provides a better basis for consultation. It is probably a futile exercise to attempt to make the rules substantively simple.[42] However, the aim is in line with the EU definition of simplicity as keeping the burden of administration and compliance costs to a minimum.

It is appropriate to consider certainty and simplicity together, because so often there is a conflict between them, both in terms of legislative drafting and taxpayer compliance. Attempts to make the rules more certain usually make them less simple to understand. The simpler the rules are the less simple they usually are either to comply with or to administer.

In the discussion in Chapters 6-8, the rights that provide certainty must be seen in the context of the struggle by revenue authorities to achieve certainty and simplicity in the face of policy demands. However, policy should not be used as an excuse to override basic taxpayers' rights. In striking this balance, the third point, that there should be transparency and visibility in the design and implementation of the tax rules becomes more important.

Consultation during policy development has become more common. This must be seen in the context perhaps of developed common law jurisdictions, where there is a wider tradition of general debate in the formulation and development of the law. It is less easy to require of a jurisdiction, which is traditionally opaque. For example, Ishimura is concerned that, 'the Japanese government and tax authorities show no sign of promoting the fairness and transparency of tax procedures'.[43] Although the Japanese National Tax Administration may argue that this is no longer the case,[44] it would be an issue found in some jurisdictions, particularly developing countries without the tradition or political infrastructure to consult widely.

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42 *See* M. McKerchar et al., above n. 38; J. Prebble, 'Why Is Tax Law Incomprehensible?' (1994) *British Tax Review*, 380; G.S. Cooper, 'Themes and Issues in Tax Simplification' (1993) 10 *Australian Tax Forum*, 417; and the analysis in W.G. Gale and J. Holtzblatt, 'The Role of Administrative Factors in Tax Reform: Simplicity, Compliance and Enforcement' (Social Science Research Network Journal, 11 February 2000), <ssrn.com/abstract=208289> or DOI: 10.2139/ssrn.208289>, 6 September 2006.

43 D. Bentley, (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998), p. 227.

44 Article 4, NTA, 'An Outline of Japanese Tax Administration', <www.nta.go.jp/category/outline/english/2741/contents.htm>, 6 September 2006.

In many OECD jurisdictions consultation is the norm. In Australia, for example, extensive consultation took place to try and ameliorate some of the costs of compliance placed on taxpayers with the implementation of major tax reforms in 2000.[45] Consultation and communication made it easier for revenue authorities to gain acceptance for electronic compliance and delivery of services. Taxpayers can see the revenue authorities both keeping in touch with the latest developments and assisting taxpayers to take advantage of electronic communication.[46]

The measures of certainty and simplicity relate to a model of taxpayers rights. They will permeate the analysis of rights in the chapters that follow. The measures are framed so that they are achievable in any jurisdiction.

3. Efficiency[47]

– Compliance and administration costs should be minimised and payment of tax should be as easy as possible.

Efficiency extends, of course, far beyond this point. However, the narrow definition has broad acceptance as a principle underlying tax policy.

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45 Review of Business Taxation, *A Tax System Redesigned: More Certain, Equitable and Durable: Report* [Ralph Report], (Canberra, The Commonwealth, 1999) and the New Tax System Advisory Board and Industry Partnerships, in ATO, *Tax and the Internet: Second Report — December 1999* ('the 2nd Report') (Canberra, The Commonwealth, 1999), para 1.3.1.

46 ATO, ibid. For examples of roll-out of electronic delivery and lodgment with plenty of education and consultation *see* e.g., USA, <www.irs.gov/efile/index.html>, 6 September 2006; UK, <www.hmrc.gov.uk/online/index.htm>, 6 September 2006; and New Zealand, <www.ird.govt.nz/online-services/keyword>, 6 September 2006. For research on the effectiveness of education, *see* J. Hasseldine, 'Using Persuasive Communications to Increase Tax Compliance: What experimental research has (and has not) told us' (2000) 15 *Australian Tax Forum*, 227; and for a specific sector: J. Hasseldine, P. Hite, S. James, and M. Toumi, 'Persuasive Communications: Tax Compliance Enforcement Strategies for Sole Proprietors' (2006) 23 *Contemporary Accounting Research*; and K. Bloomquist, 'An Overview of Some Recent IRS Research on Taxpayer Compliance Behaviour', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006).

47 C.R. Alley and D. Bentley, above n. 7, p. 622.

For example, in the context of electronic commerce the OECD *Taxation Framework Conditions* paper[48] defines efficiency narrowly in terms of minimisation of compliance and administration costs through improving taxpayer service and tax administration. The same approach is taken in both the *EU Communication*[49] and the *1999 UK Report*.[50]

Because minimizing taxpayer compliance costs and making compliance easier is thought to improve revenue collection, it is a prime focus for tax authorities.[51] So, too, is any reduction in the cost of administering the tax system. It is in these areas that most can be done in the short-term to improve co-operation between jurisdictions. Although it is a narrow view of efficiency, potentially it could have the most impact on the widest number of taxpayers.

Revenue authorities are naturally defensive when claims are made about the high costs of compliance. However, the adverse publicity does place pressure on governments and revenue authorities to consider compliance costs in formulating and implementing tax policies. This is doubly important where the potentially high costs of administering and monitoring a particular

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48 Above n. 16, p. 8.

49 Above n. 35, p. 7.

50 Above n. 36, para. 2.9.

51 For a wider discussion and details of the literature, *see* C. Evans, J. Pope, J. Hasseldine, (eds.), *Tax Compliance Costs: A Festschrift for Cedric Sandford* (St Leonards, NSW, Prospect Media Pty Ltd, 2001) and the ATAX Tax Operating (Compliance and Administrative) Costs Database, www.atax.unsw.edu.au/compliance/cc.php>, 6 September 2006. *See* examples from: the US — K. Bloomquist, above n. 46; the UK — 1999 UK Report, above n. 36, p. 49 and A. Hansford, J. Hasseldine and C. Howorth, 'Factors Affecting the Costs of UK VAT Compliance Costs for Small and Medium Sized Enterprises' (2003) 21 *Environment and Planning C: Government and Policy*, 479; New Zealand — P. Oxley and D. Elwela, 'Tax compliance costs of New Zealand small businesses, 2004: Designing the Survey for its Policy Purpose', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006), and C. Sullivan, *Improving Tax Compliance Cost Research — the New Zealand Story Continues*, Research Report 1: Measuring the tax compliance costs of small and medium-sized businesses (Wellington, IRD, July 2005); Australia — C. Evans, 'Studying the Studies: An Overview of Recent Research into Taxation Operating Costs' (2003) 1 *eJournal of Tax Research*, 64 and B. Tran-Nam, C. Evans, K. Ritchie and M. Walpole, 'Tax Compliance Costs: Research Methodology and Empirical Evidence from Australia' (2000) 53 *National Tax Journal*, 229.

form of taxation provide a significant incentive for governments to shift those costs to taxpayers and third parties.

Adopting the principle that compliance and administration costs should be minimised provides a framework for negotiation between the different stakeholders to determine a fair allocation of responsibilities and associated costs. It also provides a basis for including in the analysis whether taxpayers' rights will be impacted significantly by a change in the law that might increase compliance and administration costs. However, negotiation of this kind is fairly limited between taxpayer groups and policy makers. If taxpayers' rights are to have meaning at the policy level, they should be integral to the design and formulation of both policy and legislation. This would extend to ensuring that efficient tax administration is seen as a policy issue not simply for tax administration, but to improve the effectiveness of taxpayers' rights. This will be explored further in Chapter 7, but is also relevant to the mechanisms used to enforce legislative protection discussed in Chapter 5.

4. Neutrality[52]

- The tax system should not impede or reduce the productive capacity of the economy.
- Business decisions should be motivated by economic rather than tax considerations. Taxpayers in similar situations carrying out similar transactions should be subject to similar levels of taxation.
- Capital import neutrality and capital export neutrality should be considered.

Neutrality applies to substantive tax policy and the formulation of the regulatory framework implementing it. Although relevant to wider legal principles such as non-discrimination, those are usually considered in the context of equity and fairness. Neutrality, particularly given its narrow economic meaning in the three points, has least relevance to taxpayers' rights.

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52 C.R. Alley and D. Bentley, above n. 7, p. 622

5. Effectiveness[53]

- The system should collect the right amount of tax at the right time without imposing double taxation or unintentional non-taxation at both the domestic and international levels.
- The system should be flexible and dynamic to ensure a match with technological and commercial developments.
- The potential for active or passive non-compliance should be minimized while keeping counter-acting measures proportionate to the risks involved.

The second point is more of an economic policy point, but the first and third points have strong implications for taxpayers' rights. Tax collection is an area perceived as most open to abuse. This has been true throughout history from biblical times, when the cheating of tax collectors made it into Jesus' parables,[54] through to some extraordinary claims in the US against the IRS by Congress, resulting in the Taxpayers' Bills of Rights.[55] The discretion available in tax collection underlies taxpayer concerns that there should be clear rules and guidelines to ensure the effectiveness of the tax collection process.

From the revenue authorities' perspective risks to revenue must be minimized, while maintaining a proportionate response. The process of dealing with areas of risk is another critical area where taxpayer protection is essential while safeguarding the revenue. This is particularly true in the international context. Negotiating to eliminate international double taxation, non-taxation and tax avoidance is a complex and bureaucratic process. It is assumed that the protection of individual taxpayers' rights takes place within the domestic jurisdiction. Consequently, the mechanisms to prevent individuals from being double taxed where an international agreement fails are usually unwieldy and can be ineffective.

It is one thing to ensure the effectiveness of the tax system at the level of administration, collection and enforcement. It is a much harder task to do so while preserving the rights of taxpayers. Any model must ensure a balance between the two.

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53 Ibid., p. 623.

54 Luke 18:9, *The Holy Bible* (New International Version, 1978).

55 A. Greenbaum, *United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles* in D. Bentley, above n. 43, ch. 15.

B. Maintaining the balance

The principles will always compete and the art of taxation design is to balance the principles most effectively in achieving the intended purpose. As the Carter Commission put it:[56]

> We realize that some of the objectives are in conflict, in the sense that movement toward one goal means that others might be achieved less adequately. Simultaneous realization of all the goals in some degree will constitute success if, as we hope, our choices as to the appropriate compromises adequately reflect the [informed] consensus.

However, achieving the principles, values or goals that underlie the tax system must only be done in the context of the broader framework of taxpayers' rights. The basis that taxpayers' rights have in law must always 'trump' a principle without such a basis.[57] In the design process, which is relevant to a model, the principles should be taken into account to provide the best outcome for the taxpayer, while preserving to the greatest extent possible, achievement of the balance of goals envisaged by the Carter Commission.

To the extent that tax policy does not support a balance, there are also concerns for taxpayers' rights. For example, pursuit of effectiveness by giving the revenue authority a wide discretion is at the expense of certainty. It may seriously undermine the right of taxpayers to know how much tax they should pay and provide procedures leading to arbitrary imposition of taxes.

In considering the rights for inclusion in a model, reference will be made to the principles outlined in this chapter. They will provide a measure and sometimes a basis for rights that are included.

III. Interpretation of the content

A. Introduction

In the same way as the principles that are often used as a generalized measure of a successful tax system have variations in meaning; the interpretations of rights themselves are often different. This is natural given the range of

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[56] Carter Commission, above n. 4, p. 17.

[57] R. Dworkin, *Law's Empire* (London, Fontana Press, 1986), p. 225 and *Taking Rights Seriously* (London, Gerard Duckworth and Co., 1977), p. 116.

jurisdictions, that both civil law and common law have incorporated taxpayers' rights into their tax systems. The crossover between similar systems is difficult. That between different systems is even more so. This section explores the reasons for and the substance of some of these barriers to interpretation and submits that there is a sufficient core of certainty[58] in the underlying meaning of taxpayers' rights to make exploration of a model worthwhile. In addition, the principles explored in the first part of this chapter can add weight to that core of certainty.

B. Trends leading to blurred definitions

History has aided the development of rights and common understanding but has encouraged blurring of definition.[59] The Second World War provided a major impetus for the international protection of human rights. This was reflected in the establishment of international agreements on human rights, international courts and commissions of human rights and national and international organizations designed specifically to protect human rights. The difficulty in determining the meaning of human rights generally is discussed in Chapter 2. With the focus on human rights, it was inevitable that attention should be paid to less well-defined areas such as taxpayers' rights. Traditional human rights lawyers are unsure whether taxpayers' rights should really be categorized as human rights.[60] But the human rights focus of the last 50 years has changed the way people think. Rights, and the language of rights, have become an integral part of our culture. Rights are something that everyone can understand and they are something that everyone wants — they have evolved in popular consciousness as being very positive.

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[58] H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford, Clarendon Press, 1994), ch. VII.

[59] K. Messere, above n. 21, ch. 5, where there is some discussion of definitional ambiguity and the irrationality of language. This is a fascinating study in itself, but goes beyond the scope of this book.

[60] It is only really since the development of case law considering taxation under domestic Charters or Bills of Rights in countries such as Canada, New Zealand and the EU that there has been wider acceptance of discussion of tax law and taxpayers' rights in this context. Previously, the use of specific exclusions and the margin of appreciation doctrine, discussed in Chapter 2, precluded widespread consideration.

This development of a rights culture is reflected in the political consciousness and there has been an increase in community participation in the political process. The formulation of administrative charters or statements of rights, the introduction of a wider variety of ombudsmen, advocates and other public or consumer representatives have gathered momentum in this context. However, the proliferation of different statements of taxpayers' rights comes with a significant drawback. With popularity comes generalization and blurred definition: taxpayer rights are no exception. Take the debate when Australia was considering the form and content of a charter of taxpayer rights.

The Australian Taxation Office (ATO) position was that the charter should contain no new rights protected by law.[61] Rather, the ATO argued, a charter should reflect existing legal rights and administrative concessions; it should also contain a commitment by the ATO to meet the service expectations of the community. The Commissioner of Taxation expressed particular concern that the introduction of a charter should not clog the courts and impede efficient ATO administration by opening the floodgates to a spate of legal actions against the ATO. Naturally enough, the ATO also wanted to use a charter to stress taxpayer responsibilities.[62]

Many professional groups criticized the ATO approach, claiming that it gave taxpayers nothing more than they already had. The professional groups wanted legal rights enforceable at law. They wanted new rights, to fill what they saw as holes in existing taxpayer protection. Naturally enough, when the government followed the ATO approach, many professional bodies denounced the charter as a waste of time and money.[63] However, it was not a fair conclusion.[64]

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61 Extracts from the debate described here can be found in M. Carmody, Commissioner of Taxation, 'Taxpayers' Charter: ATO Perspective' and D. Williams, 'The Taxpayers' Charter: A View from the Profession', both papers presented at the ATAX conference on Current Issues in Tax Administration (11-12 April 1996). Also, A. Carey, 'Taxpayers' Charter' (1995-1996) 30 *Taxation in Australia*, 543 and Taxation Institute of Australia, 'Current Topic' (1995-1996) 30 *Taxation in Australia*, 230.

62 As was done, *e.g.*, in the United Kingdom's Taxpayer Charter and New Zealand's Statement of Principles.

63 For example, A Carey, above n. 61, p. 544, said that, 'Without legislative force, the Charter will lack credibility because it becomes simply another ATO brochure — certainly of interest, but of little practical importance. . . . Any who do seek reliance on it will likely be met with blank looks from ATO counter staff'.

64 Discussed in detail in D. Bentley, 'The Taxpayers' Charter: More Than a Mission Statement' (1995-1996) 4 *Taxation in Australia Red Edition*, 259 and 'Problem Resolution: Does the ATO Approach Really Work' (1996) 6 *Revenue Law Journal*, 17.

As often happens in debates of this kind, the parties tended to argue at cross-purposes. Until recently there has been little theoretical examination of taxpayers' rights. As a result, there was little context in which to place the debate. Arguments put forward tended to choose a model of enforcement: either a legislated model or an administrative model. The arguments also proposed a number of rights. However, the rights did not necessarily fit within the chosen model of enforcement. Professional bodies tended to argue for rights within a legislated charter of rights, some of which could not be enforced through legislative mechanisms. On the other side, the ATO put forward as administratively enforceable rights, goals that they could only aspire to. If either side was aware of the distinction, they did not make it plain. It is not surprising that the debate became somewhat hot and confused.

The Australian debate illustrates that, with the introduction of taxpayers' charters around the world, taxpayers' rights have become the subject of popular discussion; if not at breakfast tables, then at least in the tax community. However, worthwhile dialogue depends upon a clear consensus on the subject matter. There is still significant divergence in approach, particularly where the nuances of culture and a different perspective provide curious disparities in the way rights are chosen for protection in different jurisdictions.

C. Barriers to interpretation

The existence of a classification of rights and a model will not provide uniformity of understanding. The content of each right will differ according to the tax system in which it is found. Content is determined by numerous factors, the more important of which are identified in this section.[65]

An illustration of the importance of interpretation is found in the context of information exchange.[66] The last decade has seen an increase in the focus on international transactions and international tax avoidance. The idea of tax authorities exchanging information on taxpayers to combat tax avoidance is not new.

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[65] Interpretation of language is a complex field beyond the scope of this book. However, some discussion of the most important factors preventing common understanding is essential at a basic level. *See further*, in the context of information exchange, V. Tanzi and H.H. Zee, 'Can Information Exchange be Effective in Taxing Cross-Border Income Flows?' in K. Andersson, P. Melz and C. Silfverberg (eds.), *Liber Amicorum Sven-Olof Lodin* (Stockholm, Kluwer Law International, 2001), p. 259.

[66] V. Tanzi, *Taxation in an Integrating World* (Washington DC, The Brookings Institute, 1995).

However, its use has only expanded with the advent of sophisticated methods of electronic information gathering that can be used equally effectively to transfer large quantities of information quickly and easily between states.

Information exchanges are governed by a range of international agreements. Most of these are bilateral, but the focus on regional economic groupings has led to some multilateral agreements. Double tax agreements are the most common bilateral arrangements containing provisions for the exchange of information between tax authorities. At a multilateral level, in 1995 the OECD Convention on Mutual Administrative Assistance in Tax Matters (OECD Convention) entered into force. Its objective is to promote international cooperation to help the national tax laws of the signatories to operate more effectively, while respecting the fundamental rights of taxpayers. It sees the protection of those rights as being based on the national protection within the participating jurisdictions.

The OECD Convention attempts to apply the most favourable protection available in the jurisdictions concerned. For example, Article 22 provides that the stricter secrecy laws in either of two states exchanging information will apply to any information provided. There is an immediate imperative therefore to reach a common understanding of the rights of the exchanging states. It becomes immediately obvious how this can lead to confusion where the states concerned have different languages, different legal systems and different political, economic and social agendas. It is more difficult than treaty interpretation. It requires one state to understand the full content of the domestic rights afforded to the taxpayers of another state and compare it to its own rules before it can comply with the terms of an international agreement to which it is party. This section explores some of the issues relevant to interpretation.

1. Mechanism for enforcement

One of the main influences on content and meaning is the mechanism for the enforcement of a right and this is the basis for the classification scheme set out in Chapter 5, where this issue is explored further. In Chapter 5, it becomes clear that the differences between administrative and legislative enforcement of a right provide substantial differences to the content.[67] An obvious example is

[67] As stated in M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), p. 465, p. 471, in the context of a comparison of bills of rights generally, 'much depends upon the consequences that

where a jurisdiction determines that a taxpayer has a right to know the penalties that will be imposed for non-compliance with an aspect of the tax law.

If the imposition of the penalty and the rate at which it applies is set out in legislation without any administrative discretion, then there is strict liability and the content is absolutely clear in all situations. In many jurisdictions, the right to impose a penalty for non-compliance is legislated, sometimes setting out a range of penalties and/or the maximum rate. However, a broad discretion is given as to when a penalty will be imposed and at what rate. The content of the penalty provisions will depend on the criteria used in the exercise of the discretion, how the criteria are applied and whether there is negotiation over the penalty. That there is a penalty for non-compliance is absolutely clear, but its application (content) may vary considerably.

2. Nature and type of legal system

The nature of a legal system is crucial in determining the content of the rights of citizens. Rights are meaningful in countries where the rule of law is upheld, and lose their meaning as the rule of law disintegrates. The apparent presence of the rule of law does not always mean that it applies to the tax system. Tax administration, collection and enforcement is one of the most sophisticated roles of government, and one of the first to break down. Examples of this were the system in Russia during the 1990s,[68] and in many African states in the 1980s and 1990s.[69] To all intents and purposes the rule of law is in place, but as far as the tax system is concerned, the government bureaucracy does not have the resources, the power or the training to give proper effect to all tax laws.

The type of legal system and its context will also determine the content of taxpayer rights. The marked differences between civil and common-law systems are quite often also found among systems of the same kind. Two otherwise

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attach to the recognition of a specific list of rights, especially in terms of the legal and administrative consequences that follow and the availability or otherwise of judicial remedies'.

[68] S. Himes and M. Milliet Einbinder, 'Russia's tax reform' (1999) 215 *OECD Observer*, <www1.oecd.org/publications/observer/215/e-himes.htm>, 5 September 2006.

[69] For example, A. Mwenda, *Global Corruption Report: East Africa,* (2003), p. 237, www.transparency.org/content/download/4449/26756/file/22_East_Africa_(Mwenda).pdf, 6 September 2006.

similar systems of law may have quite different structures; for example, the structure of their appeals systems.[70] Darrow and Alston suggest that the prevailing system of government and the nature, role and effect of the legal system must be explored before there can be any real understanding of the meaning of the rules it contains.[71] There is more common ground in the area of taxation law than in many other areas of the law. Nonetheless, tax is, in many ways, a gloss on the legal system, or a legal ectopia, as John Prebble describes it.[72] That means that whenever tax is imposed, differences in the substantive law governing the arrangement or transaction to be taxed will translate into differences in tax administration and procedure. For example, the constitutional concept of the separation of powers is different in Sweden from the same concept in common law countries.[73] This impacts on the nature of the ruling system: the extent to which the National Tax Authority in Sweden can provide public rulings is arguable, whereas the principle of the separation of powers in Australia does not prevent the ATO from issuing public rulings.[74]

3. Language

Care must be taken, when comparing tax systems, to understand the nuances underlying the legal or administrative interpretation of the content of rights. An Australian doing business in Hungary and the United Kingdom might be comforted by the apparent similarities of those tax systems' administration. The reality could be quite different. Language is a major barrier to understanding content. Sometimes ignorance of meanings in a common language is even more dangerous than ignorance of those in a foreign language, because they are so unexpected. For example, a business operating in Japan would take care to understand the legal effect of tax circulars, but might assume that advance rulings provided by tax authorities in the different English-speaking jurisdictions are broadly the same because they have the

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70 *See*, *e.g.*, OECD, *Taxpayers' Rights and Obligations* (Paris, OECD, 1990) and D. Albregtse and H. van Arendonk, (eds.), *Taxpayer Protection in the European Union* (The Hague, Kluwer Law International, 1998), ch. II.

71 M. Darrow and P. Alston, above n. 67, p. 470.

72 J. Prebble, above n. 42, p. 380.

73 For a discussion of these principles, *see* A. Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Stockholm, Juristförlaget, 1995), ch. 3 and 4.

74 For a discussion on this point, *see* D. Bentley, 'A critique of the Swedish rulings system' (1997) *SkatteNytt* 567, 580.

same name, whereas they are in fact quite different in their operation and effect.[75]

Translation of terms that have a technical meaning can lead to misunderstanding. In the OECD Model Tax Convention on Income and Capital (OECD Model), Article 5 uses the English term *agent*. In the French it is *commissaire*. Avery Jones and Ward point out that this leads to confusion, as the content of the words does not translate exactly.[76] Even where such terms are translated, they are often of value only if the reader understands the context of the right, which may require detailed knowledge of the administrative and commercial systems of the relevant jurisdiction.

4. Law

Legal barriers can limit understanding of both content and application of rights. There are problems of definition. What is a tax in one country is not necessarily a tax in another country. What is included in the definition of a right may not be included in another country. More important, a principle that exists and has substantial meaning in one jurisdiction, for example, *l'ordre public* in France, may not even exist in another, such as the UK.

5. Politics

There are political barriers to common interpretation of rights. This can be seen in the context of information exchange. Where a state is asked to supply information about its taxpayers and there are concerns that to do so might discourage foreign investment, the rights of parties in the state supplying information may be interpreted strictly so that the information is not supplied. This might be even more likely if competitors for that investment do not exchange information. Conversely, in the context of international co-operation to combat tax evasion, governments may well come under pressure to read down taxpayers' rights in the interest of obtaining a result.

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[75] For a comprehensive international review, *see* D. Sandler and E. Fuks (eds.), *International Guide to Advance Rulings* (Amsterdam, IBFD Publications BV, 1999).

[76] J. Avery Jones and D. Ward, 'Agents as permanent establishment under the OECD Model Tax Convention', (1993) 33 *European Taxation* 154.

6. Technology

Technology would not normally impact on the interpretation of the content of rights. However, given the increase in information exchange, interpreting how rights are applied is sometimes dependent on the quality of the information supplied. Appropriate protection of information is only possible if the authorities know what the information is that is being exchanged. This might be relevant, say, in a multi-jurisdictional transfer-pricing audit where information is being exchanged. Article 22 of the OECD Convention requires sufficient understanding of the information to maintain appropriate secrecy.

For example, to provide for this type of concern in the US :[77]

> In the case of Routine or Automatic Information Exchanges, the IRS has actively promoted the use of computer readable magnetic media in the exchange of this type of information. In working with its other treaty/TIEA (Tax Information Exchange Agreement) partners, the IRS has endeavoured to enhance the utility of such exchanges through the development and adoption of a uniform set of standards and specifications relating to record layouts, interchange codes and the physical properties of the media.

D. Interpretation of rights in the model

The clauses in the Model will be translated into domestic law and administrative procedure. It is therefore very unlikely that reference will be made to the Model or its commentary in the interpretation. The position is very different for tax treaties based on the OECD Model and its commentaries. They remain treaties between countries and are governed in part by international instruments, such as the interpretation articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties. It is under the Vienna Convention articles that the OECD Model and the 1980 UN Model Double Taxation Agreement Convention between Developed and Developing Countries (UN Model) and their commentaries are usually accepted as aids to interpretation of the treaties.[78]

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[77] S. Novack, 'The US Experience' in OECD, *Taxation and investment flows* (Paris, OECD, 1994), p. 171.

[78] *See*, *e.g.*, in the UK, *IRC v. Commerzbank*, (1990) STC 285 and generally, M. Lang, (ed.), *Tax Treaty Interpretation* (The Hague, Kluwer Law International, 2001), and F. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam, IBFD, 2004).

The aim of the Model is to influence the formulation of policy, so that legislation and administration reflect the rights in the Model, translated contextually into the particular jurisdiction. The rights that are embraced will be affected by a range of factors, including those identified above, which will give a slightly different content depending on the jurisdiction. The substance should remain broadly the same, but the effect may differ substantially. For example, the right of appeal in tax matters may have little benefit for a taxpayer on a low income in a jurisdiction where access to the legal system is the province of a minority on higher incomes. In countries with taxpayers on relatively high incomes and facilitated access to the appeal system it may be of widespread use. The content will also differ where jurisdictions at similar stages of economic development have different legal systems and appeal processes that have a very different effect.

There are further interpretation issues specific to the Model. When it comes to interpreting the rights contained in a jurisdiction, the interpretation will depend very much on the form of enforcement. The correlation between the interpretations of rights in different jurisdictions, even when the legal systems are different, is likely to be stronger where the rights are legislated. Legislation is formal and in the tax area not dissimilar. This is apparent from works on comparative taxation.[79] The legal procedures accompanying legislation may differ, but the general form and structure of legislation is broadly similar.[80] It becomes more difficult when comparing administrative rights, because the administrative systems are more diverse. Even in an area such as the provision of advance tax rulings, which has been driven to some extent by international convergence in the drive to attract foreign investment, there are significant discrepancies in approach.[81]

The meaning of the Model will depend on the type of legal system and the structure and style of the tax system. The different types of legal system, or

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[79] For example, H.J. Ault and B.J. Arnold, *Comparative Income Taxation: A Structural Analysis, Introduction to Law* (2nd edn., The Hague, Kluwer Law International, 2004) and V. Thuronyi (ed.), *Comparative Tax Law* (The Hague, Kluwer Law International, 2003).

[80] D. Albregtse and H.P.A.M. van Arendonk, above n.70; A. Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil and Common Law Countries — Have New Zealand Taxpayers Been "Short-Changed?"? (1999) 32 *Vanderbilt Journal of Transnational Law*, 1345, and P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001).

[81] D. Sandler and E. Fuks, above n. 75.

legal families, have different characteristics.[82] Although Thuronyi suggests that the three main types of tax system are represented by Germany, the United Kingdom and the United States, he points out that both courts and legislatures in jurisdictions represented by each of those styles will adopt sometimes widely differing solutions to the same problem.[83] The economic and social context will also have a substantial impact on the phrasing and interpretation of rights. A complex dispute resolution process suited to an advanced OECD economy will not easily translate to one of the poorer Pacific island nations, where a traditional economic and social infrastructure with its own idiosyncratic dispute resolution mechanisms underpins the tax system. Procedures that form a large part of the content of the rights in the Model, are particularly open to cultural difference. It is straightforward to say that we should tax capital gains. How it is carried out in an advanced western economy will differ markedly from how it is carried out in a rural agrarian economy with strong communal land ownership. Procedural rights must exist in both, but with strong nuances to cope with the divergent contexts.

As discussed above, the Model will have different meaning and content depending on the words used to implement the rights. In the context of anti-avoidance rules for example, the doctrine of *fraus legis* has no equivalent meaning in common law jurisdictions.[84] However, even in civil law jurisdictions its meaning and content is different.[85] It is therefore important that the drafters of the legislation or rules are clear on the intended content. They should use terminology that will give effect to that content without ambiguity that leads to a reading down of the rights.

The process of interpretation will differ between jurisdictions. For legislated rights it is not just a matter of discerning differences between a more principled civil law approach and a common law approach that examines closely the wording and construction of the legislation itself. The interpretation will depend very much as to how the courts view legislated taxpayers' rights — what classification of legislation it falls into. If it is seen as forming part of the standard law governing administration of taxation, then the normal rules of interpretation in that jurisdiction will apply. Where it is acknowledged that the legislation was introduced for a particular purpose, the courts may interpret it in the light of both the historical intent and the purpose of the legislation. In civil law jurisdictions such as Germany, Switzerland and the Netherlands the

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82 V. Thuronyi, above n. 79, ch. 1, 2 and 5.

83 Ibid., p. 9.

84 Ibid., p. 158.

85 Ibid., pp. 159-160.

teleological approach is used to construe the tax law so as to fulfil the legislative purpose.[86] In common law jurisdictions such as Canada, Australia, India and Israel a purposive approach is often used to give a broader construction, particularly in the context of general anti-avoidance rules.[87]

Rules such as general anti-avoidance rules can be seen as a broader type of rule that has an overarching application. Taxpayers' rights should at least be seen in this light. A purposive interpretation is also more likely to support the principles set out in the first part of this chapter that form the basis for most tax systems.

A preferred approach to interpretation by taxpayers will be where taxpayers' rights, although contained in a tax act, are interpreted in the same way as other rights legislation. The European Convention on Human Rights has been incorporated into the legislation of many member countries and the courts have developed a strong teleological approach to interpretation to ensure that Convention rights fulfil their object and purpose.[88] The effect has been that an interpretation 'that builds on the rules of public international law on the interpretation of treaties'[89] is incorporated into the interpretative process of the member states.

Different methods of legislative enforcement are discussed in Chapter 5. Whether or not a jurisdiction uses a method that gives stronger protection of taxpayers' rights clauses than that afforded to other tax law, courts can provide their own reinforcement of the rules through the interpretive method they adopt. This has clearly been the case in maintaining the effect of general anti-avoidance rules.[90] Rishworth et al. identify some of the influences

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86 Ibid., 1, p. 36 *et seq.*, particularly pp. 146-147.

87 Ibid., pp. 140-141

88 D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, Butterworths, 1995), p. 7, that the Convention 'must be given a dynamic or evolutive interpretation'.

89 C. Ovey and R.C.A. White, *Jacobs and White European Convention on Human Rights* (3rd edn., Oxford, OUP, 2002), p. 41.

90 V. Thuronyi, above n. 84, ch. 5. Australia provides illustration. The courts were instrumental in reading down the effect of the general anti-avoidance provision, the Income Tax Assessment Act 1936 (Cth), s. 260. This led to legislative introduction of a much more detailed substitute in Part IVA of the same act. However, soon after Part IVA was introduced, the High Court seemed to reverse its approach to the interpretation of s. 260, in cases still before it, to give it the teeth that the legislature apparently originally intended. The section remained the same but the interpretation went full circle. *See* I.C.F. Spry, *Arrangements for the Avoidance of Taxation* (Melbourne, The Law Book Company Ltd, 1972) for an analysis of its original application and

on judicial interpretation where courts recognize the special nature of rights clauses and the language used.[91] Although the authors refer to the New Zealand Bill of Rights, which does have special status in law, a number of these influences can apply to interpretation of an ordinary legislative clause. They apply simply where the court recognizes a clause as one providing a right and therefore requiring, in its view, a particular approach to its interpretation.

The first point they make is that some rights are expressed generally, but will have specific application.[92] The content of a right depends very much on how restrictively it is applied. An interpretation that recognizes the importance of giving rights meaning will extend their reach. Administrative review in common law jurisdictions traditionally has been somewhat restrictive in scope. However, both the courts and the legislature have recognized over the years that as modern bureaucracy becomes more complex, there is rationale for extending the scope of administrative review.[93] This recognition has led also to an acceptance by the courts that they will themselves on occasions broaden the scope of judicial review.[94] As they interpret legislated taxpayers' rights, the courts may adopt a similar purposive approach simply because they are interpreting rights.

Rishworth et al. point out that rights 'set a benchmark for acceptable governmental conduct and law'.[95] It does not mean that the rights have to be encapsulated in a separate bill of rights to have this effect. It means that when legislation is being interpreted, its application should not fall below the benchmark set by the rights. Obviously, that in itself is a matter of interpretation. However, simply articulating rights in law gives them greater emphasis and presence in the minds of judges than when they are only implied. It sets a standard that develops in content and meaning over time. In this sense, Rishworth et al.

J. Waincymer, *Australian Income Tax Principles and Policy* (2nd edn., Sydney, Butterworths, 1993), ch. 20, for a description of the changes in interpretive approach.

91 P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, *The New Zealand Bill of Rights* (Oxford, OUP, 2003), ch. 2.

92 Ibid., p. 25.

93 *See*, *e.g.*, C. Enright, *Federal Administrative Law* (Sydney, The Federation Press, 2001), pp. 6-7 and O. Hood Phillips, P. Jackson and P. Leopold, *O. Hood Phillips and Jackson: Constitutional and Administrative Law* (8th edn., London, Sweet and Maxwell, 2001), pp. 648-650.

94 This has arguably been the case in both the UK cases, *Associated Provincial Picture Houses v. Wednesbury Corporation*, [1948] 1 KB 223 and *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] AC 374.

95 P. Rishworth et al., above n. 91, p. 26.

identify rights clauses as either confirmatory or amendatory.[96] By this they mean that rights will either confirm existing values or amend and transform the system through the introduction of rights that have been previously missing or imperfectly realized.[97] An example of the latter was the amendments introduced through the various US taxpayer rights bills in the 1980s and 1990s — for example, including reversing the onus of proof in assessment disputes.[98]

A further point made by Rishworth et al., particularly pertinent to common law jurisdictions, is that a legislated right could be interpreted restrictively to coincide with its existing common law meaning or it could be interpreted broadly.[99] A broader reading could widen the interpretation of existing common law rights, extend the scope and effect of the rights, provide more effective remedies or do a combination of the three.[100] Simply legislating an existing right does provide the opportunity to revisit its interpretation.

The context and broad approach to interpretation is important. However, as Article 3 of the Model in Chapter 9 includes an interpretation clause, it is useful to examine how this should be applied. Here we can draw on the approach taken in New Zealand, where the interpretation clause plays a significant role. Although it is backed by other sections that reinforce the application of the Bill of Rights in instances of potential contradiction, Rishworth et al. summarize the methodology applicable specifically to the interpretation clause that flows from the Bill of Rights and the way it has been considered thus far by the courts.[101] Applying the four steps they identify to the Model:[102]

1. Is there a protected right that is affected by another enactment? This requires consideration of the scope of the protected right.
2. Would a suggested meaning or purported application of the other enactment be inconsistent with or conflict with the meaning of the protected right? This requires in part exploration of the limits inherent on the protected rights. If there is a potential conflict or inconsistency only then does the next step apply.
3. Is it possible to interpret the potentially inconsistent or conflicting enactment in a way that avoids the inconsistency or conflict?

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96 Ibid., 31.
97 Ibid., 32.
98 A. Greenbaum, above n. 55, p. 371.
99 P. Rishworth et al., above n. 91, p. 39.
100 Ibid.
101 Ibid., 133.
102 Ibid.

4. If such an interpretation is possible then that is the meaning that should be adopted. If such an interpretation is not possible only then would a court make a declaration of incompatibility. To the extent that an interpretation is possible that limits the incompatibility with the enactment, that interpretation should be favoured over an interpretation that does not.

This is an approach that is familiar to common law jurisdictions. However, it flows naturally from public international law and the interpretation approach taken to make international treaties as effective as possible. This is particularly the case in the interpretation of human rights instruments. The adoption of an interpretation clause in the Model is explored in more detail in Chapter 5.

E. Convergence

Despite the barriers to consistent interpretation across jurisdictions, there is a range of forces, other than economic forces, driving convergence. They include the interrelationship between different legal systems, the common adoption of the principles outlined in this chapter and the wide acceptance of the concept of taxpayers' rights discussed in Chapter 2. It is highly unlikely that there will ever be one tax system. Even at the broadest level and where there is strong economic incentive, the EU provides an excellent example of the difficulties in conforming different tax systems. However, as international investment and world trade become increasingly important to every jurisdiction, there will be elements of convergence. The focus by revenue authorities on improving the efficiency of tax administration and procedure has extended across borders. The influence of the IMF and World Bank, discussed in Chapter 2 has encouraged some broad similarity in approach to tax administration. The following chapters will illustrate commonality in approach to tax administration and procedure, where taxpayers' rights are found.

At the level of specific rights there will also be increasing convergence. Although there is seldom one meaning for terms used, a common definition of content develops over time as clauses are interpreted in the light of specific cases. The more sophisticated legal systems begin to reflect in their domestic systems the changes that are encouraged through membership of international agreements that set increasingly higher standards. The framework of rights slowly expands and reinforces those higher standards as a general expectation within any tax administration.

Nonetheless, there will be numerous particular rights where the common definition is not required or is impossible to find given the peculiarities of different legal and tax systems. A common conception of effect will exist at the higher level. The implementation to give that effect will require widely different measures. This does not undermine the argument for a Model.

It is argued that a Model is timely, necessary and relevant as a standard for best practice in tax administration. However, it is important to remember that the Model will be translated into different legal systems. It will not transform them into a uniform set of rules. The similarities may be misleading, as the act and effect of translation are likely to change the nature and content of the rights to suit the legal system. Hopefully, the effect of the rights will be the same. The outcome will be to provide the full measure of protection intended by the Model, but in the context of that legal system. It is therefore important to understand at this point that the Model will not resolve differences in tax administration and procedure. That is not its aim. It will rather provide a set of rights that should be given effect in each tax system. There may be convergence, but that will be because of other forces of change and not the adoption of the Model.

IV. Conclusion

The formulation of any tax policy is based on underlying principles that shape the subsequent legislation and administrative rules and procedures. The traditional principles used in benchmarking tax systems are almost all relevant to some extent to taxpayers' rights. The Model will reflect the revised definitions identified in the first part of this Chapter in its formulation of rights. They will help to shape the rights to ensure that they fall within a widely accepted policy framework.

Once the rights are formulated and there is proliferation in statutory instruments and administrative rules and procedures around the world, there will be more interest in the comparative interpretation of rights.[103] The jurisprudence of taxpayers' rights will grow and this will assist in the development of a comparative view of the interpretation of taxpayers' rights.[104] This may

[103] The 1990 OECD Survey, above n. 70, was simply an early example of a general desire to compare rights which shows no signs of abating.

[104] This can already be seen from such works as H.J. Ault, above n. 79; V. Thuronyi, above n. 84 and D. Albregtse and H. Van Arendonk, above n. 70.

lead to difficulties. For example, assume a jurisdiction with an active court but an undemocratic government or an economy in the early stages of development. An active court could drive the development of rights more quickly than the legislature intended when enacting them. However, this element in the process of convergence provides the momentum for setting an accepted benchmark of good practice in tax law and administration. As seen in Chapter 2, the development of taxpayers' rights should provide substantial benefits for the tax administration as well as taxpayers. Even where the transplant of legislation is sociologically inappropriate, a purposive interpretation by the courts can redeem the rights clauses and give them meaning that is effective in the economic, legal, social and cultural context of the tax law for that jurisdiction.[105]

Although the content of rights might change slightly, it is nonetheless important to establish a framework of rights that can be used in the review of any system of tax administration. As discussed in the context of human rights in Chapter 2, there can be a common understanding of which broad rights are appropriate within a tax system. The test for a particular jurisdiction is whether a broad right of a particular kind exists. Once that is established, it is possible to examine its content and application. Although they will vary with the legal, social, political, economic and cultural environment, the question is whether the protection is sufficient or whether there are gaps.

Chapter 2 provided the rationale for a Model. Chapter 3 has demonstrated the importance of keeping the rights chosen in broad agreement with the principles that generally underlie tax systems. It has also shown that although interpretation of rights will cause their content to differ in practice, there will be some convergence over time. It is these differences depending upon context that emphasise the importance of the Model as a guide to best practice rather than a particular set of rules. Chapter 4 now analyses the context that gives weight to the argument that a Model is both timely and beneficial. It then proceeds to classify the rights contained in the Model in the light of that context.

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[105] P. Alston, 'A Framework for the Comparative Analysis of Bills of Rights' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), p. 1, p. 12.

CHAPTER FOUR

The Context and Classification of a Taxpayer's Rights

I. Introduction

Chapter 2 identified the basis for a general model of taxpayers' rights grounded in rights theory and in a context of domestic and international acceptance of standard setting in taxation. The chapter emphasised that the Model should contain rights that have general acceptance and that the rights should be broad enough to be adapted to the particular context of each jurisdiction.

Chapter 3 set out the principles that underlie the tax system. It showed that they have broad acceptance and can inform the nature and content of taxpayers' rights included in a model. However, the Chapter also warned that interpretation of the meaning of both the principles and the content of taxpayers' rights can be blurred across jurisdictions so that even rights that appear to be the same may have different substance when interpreted in a different context. Identifying the differences can be difficult given the inherent barriers that hinder easy access to a common meaning. The chapter concluded that there is a trend towards some commonality of meaning, which will increase with the adoption and subsequent interpretation of rights from the Model.

Chapters 4 and 5 provide the framework for a detailed analysis of the rights in Chapters 6 to 8. To analyse a right it is essential to place it in context. A broad context is provided in the first part of the chapter. It demonstrates the expanding role of government, but in response, the increasing protection of general rights and taxpayers' rights. It shows that a Model of taxpayers' rights as a guide to best practice in tax administration is both timely and beneficial.

The type of right and the manner of its enforcement governs its nature, interpretation and application. The second part of this chapter provides a classification of taxpayers' rights in the context of the mechanisms for their enforcement. Chapter 5 explores those mechanisms in detail to identify the strengths and weaknesses of each. It will be demonstrated that the nature of the rights included in a model of taxpayers' rights depends upon the method of enforcement used.

II. The context for a model: expanding government

It is beyond the scope of this book to provide more than a cursory overview of the legal and political environment that must shape any model of taxpayers' rights. However, it is important to provide an overview of recent developments that influence the rule-making environment and the nature of the rules that depend upon it. This in turn provides the basis for arguing that a Model of taxpayers' rights is timely and beneficial.

John Milton once said:[1]

> The power of kings and magistrates is nothing else, but what only is derivative, transformed and committed to them in trust from the people to the common good of them all, in whom the power yet remains fundamentally and cannot be taken from them, without a violation of their natural birthright.

That is the basis for democracy and, arguably, it is only in democracies where there is genuine operation of the rule of law[2] that taxpayers' rights can have real meaning.[3] Nonetheless, most jurisdictions rely for their economic survival through foreign direct investment on some level of recognition of legal

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1 J. Milton, *In The Tenure of Kings and Magistrates* (Glided Lyon, London, Matthew Simmons, 1649).

2 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn., London, Butterworths, 1960), p. 183, was an early proponent of the concept of the rule of law as a feature of the English constitution and it is a phrase that has taken on a far wider meaning, e.g., J. Raz, 'The Rule of Law and its Virtue' in R.L. Cunningham (ed.), *Liberty and the Rule of Law* (College Station, Texas A and M University Press, 1979), p. 11.

3 This is brought home by the example of the charges leveled at Mikhail Khodorkovsky, the Russian oil billionaire, and Yukos, the oil company he controlled, for tax evasion. According to a Special Report in *The Economist* (May 21st-27th 2005),

protection, albeit that the protection afforded to foreign investors is sometimes greater than that provided to citizens.[4]

Arguably, what is meant by the rule of law can determine the extent to which citizens can rely on rights given to them by law. Hayek states that:[5]

> Stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

Neumann argues that this is simply recognition of procedural justice and it is in Hayek's effective addition of a moral dimension to the concept of the rule of law that he gives a broader meaning to the concept that distinguishes conditions under a free government from that under an arbitrary government.[6] Neumann calls this a thickening of the rule of law.[7]

Neumann defines the rule of law as a thin concept without added moral content, where 'there are certain minimum external standards for law and for legitimate state action' that make a system not morally, but legally good.[8] The thin concept provides the basis for arguing that there is rule of law in some jurisdictions although the content of that law may be morally repugnant. It is

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pp. 24-25, 'Last December, in a transaction surreal even by Russian standards, Yuganskneftegaz, Yukos' main production arm, was forcibly sold in another rigged auction, to a company registered at a provincial grocery shop'. Mr Andrei Illarionov, President Putin's economic adviser is reported to have called it 'the swindle of the year' (at p. 25). Whatever the truth of these allegations of rough justice, there was a general perception that the rule of law was not consistently upheld and that this affected taxpayers' rights in particular.

4 The PRC has recognised the appeal of a uniform set of tax laws with the gradual unification of the tax regimes for both resident and non-resident corporate taxpayers: discussed in W. Chan and I. Wong, 'The Taxation of Foreign Investment Enterprises and Foreign Enterprises' (2005) 11 *Asia-Pacific Tax Bulletin*, 447.

5 F.A. Hayek, *The Road to Serfdom* (London, Routledge Press, 1944), p. 54.

6 M. Neumann, *The Rule of Law: Politicizing Ethics* (Burlington, VT, Ashgate Publishing, 2002), p. 3.

7 Ibid., p. 5.

8 Ibid., p. 7, with an expansion of the meaning of his definition in ch. 2. In later chapters Neumann explains how moral and ethical principles can add content effectively to the rule of law, provided we are realistic about its initial meaning. The International Commission of Jurists, *The Rule of Law in a Free Society,* working paper on the Rule of Law (New Delhi, India, International Congress of Jurists,

also relevant to the discussion of which rights should be included in the Model in Chapter 6. Given that taxpayers' rights exist in some form in any jurisdiction that is not collecting revenue through arbitrary expropriation of property, it is helpful to begin there with a thin concept of the rule of law and add moral content thereafter.

In examining the ideal context for taxpayers' rights, however, arguably it should be a democratic regime in which the rule of law as a thicker concept can be applied, as the moral dimensions of justice and fairness are more obviously present. This is by no means certain, as Blackstone observed, for politicians who exercise the sovereignty of an absolute and unconditional majority in a democracy may exercise that power unchecked.[9]

To counter Blackstone's concern, democratic government is nowadays based upon some form of separation of powers to prevent the re-emergence of the problems seen in democracies particularly in the first half of the 20th century.[10] Theoretically the executive is responsible, as in the US, directly to the people or as in the Westminster System, to the legislature. The legislature is elected by the people. Judicial power rests with the courts. Judges are usually appointed — not elected, and do not participate in political activity. This protects them from the necessity of applying the law to satisfy the will of the majority. It enables them to maintain the independence necessary to effect the impartial administration of justice and to act as a check on the other branches of government.[11]

Largely a feature of the last 50 years, 'making judges responsible for testing the legitimacy of laws passed in the name of the people, against

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1959), p. 313, is recognised as a 'thick' theory of law and is roundly criticised by J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979), p. 196. Sampford provides a broader analysis of theories of the rule of law in C. Sampford, *Retrospectivity and the Rule of Law* (Oxford, OUP, 2006), ch. 2. 21st century conceptions are explored in S. Zifcak (ed.), *Reconceiving the Rule of Law* (London, Routledge, 2004).

9 W. Blackstone, *Commentaries on the Laws of England* (Chicago, University of Chicago Press, 1979), vol. 1, p. 91.

10 Developed in the 18th and 19th centuries through the US Constitution in particular, theorists such as Montesquieu, Locke and Hobbs were influential in the development of modern constitutional government. *See e.g.*, C. Montesquieu, *The Spirit of the Laws* (1989 translation), Cambridge Texts in the History of Political Thought, (Cambridge, Cambridge University Press), p. 157. The idea is explored further in D.M. Beatty, *The Ultimate Rule of Law* (Oxford, OUP, 2004), ch. 1.

11 In the US, the political battles over the confirmation of presidential appointments to the federal bench and Supreme Court sometimes reach epic proportions. *See e.g.*,

rules and principles that are embedded — more or less explicitly — in a constitutional text, has flourished as never before'.[12] Not traditionally a feature of European jurisprudence, the roles taken by the German Constitutional Court, the European Court of Human Rights and the European Court of Justice have made this approach more acceptable. The drive towards judicial autonomy has meant that governments not seen as democratic will still usually operate with at least some of the elements of judicial independence.[13]

Fundamental to any democratic system is the principle that the organs of government are subject to mutual checks and balances.[14] However, this is not always effective. In recent years the executive arm of governments has grown in importance, increasingly and, perhaps necessarily, usurping the role of the legislature. Many of the powers that the executive arm exercises are too broad; too complex; too detailed, for the legislature to be able to participate in, more than to act in a monitoring role. The size and extent of the activity of the executive and its public service places a heavy burden on the courts, as they

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'The battle over the judges: Armageddon for the Senate' *The Economist*, (May 21st-27th 2005), p. 35. The article includes an interesting table (on p. 36), showing that the percentage of confirmations of presidential judicial appointments to the District and Circuit Courts ranged from 61.5 per cent for President Clinton in 1999 through to 97 per cent for President Carter in 1977. However, research has shown that appointees often do not satisfy the hopes of their presidential appointers as they exercise their independence of thought. *See further*, L. Tribe, *God Save This Honourable Court: How the Choice of Supreme Court Justices Shapes our History* (New York, Random House, 1985); R.L. Pacelle, *The Supreme Court in American Politics: The Least Dangerous Branch* (Boulder, Westview Press, 2001); and D.M. Beatty, ibid.

12 D.M. Beatty, above n. 10, p. 2.

13 Although effectiveness decreases with the autocracy of the executive and the proper functioning of the tax administration. *See* in the historical context of the Venezuelan tax system, M.C. Arocha, 'Comments' in R.M. Bird and M. Casanegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington DC, IMF, 1992), p. 336.

14 Discussed in F. Vanistendael, 'Legal Framework for Taxation' in V. Thuronyi (ed.), vol. 1, *Tax Law Design and Drafting* (Washington DC, IMF, 1996), p. 16. For a general discussion, *see* P. Keyzer, *Constitutional Law* (2nd edn., Sydney, Lexis Nexis, 2005), p. 14. Upheld specifically in Australia in *Chu Kheng Lim v. Minister for Immigration*, (1992) 176 CLR 1 and *A. v. Hayden*, [No. 2] (1984) 156 CLR 352. Habermas would argue that this is the appropriate role of the judiciary, to rid the process of democracy of its inequities and arbitrariness: J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. (Cambridge, MA, MIT Press, 1996), p.107.

seek to arbitrate on the meaning of the law, particularly when it requires the overturning of executive decisions. As they exercise their roles in the midst of such complexity, it will be shown, for example in Chapter 5 in the context of enforcement, that standards are becoming increasingly useful as guides for all three arms of government.

Although theories of judicial decision-making provide a strong basis for saying that decisions of judges are removed from bias and personality, the majority of lower courts with burgeoning workloads simply do not have the luxury of time knowingly to integrate broader issues of principle into their decisions.[15] Beatty argues that it is time to focus not on what judges should be doing, but on 'how courts actually exercise their powers of judicial review'.[16] Practice suggests that the desire for the courts to act as a check on the activities of the executive is not always met.

The problem for the courts is that administrative decision-making is often not subject to the law, except in narrow procedural areas.[17] This leaves large tracts of what effectively is the law, unguarded by an independent and impartial judiciary. Some argue that it strikes at the heart of the democratic form of government. Sir Gerard Brennan, then Chief Justice of Australia, recalled Lord Hailsham's statement that, 'We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice'.[18] The Chief Justice noted that, in Australia:[19]

> [the] description is close to the mark. . . . But there are dangers in maintaining a structure which lends itself to the concentration of political power in the Executive Government. There is a risk of efficiency turning to tyranny. . . . The traditional checks and balances are inadequate to protect minorities and the interests of individuals.

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15 Writers such as Dworkin and Posner have large bodies of work that provide the theoretical analysis of decisions even in hard cases that suggest judges do or should effect such integration. In most jurisdictions the larger matters of principle are recognised only at the level of the higher courts.

16 D.M. Beatty, above n. 10, p. 34.

17 Discussed in D. Bentley, 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules' (1996), 25 *Australian Tax Review*, 97 and 'The Taxpayers' Charter: More Than a Mission Statement' (1995-1996), 4 *Taxation in Australia Red Edition*, 259.

18 In his 1976 Dimbleby Lecture, cited in the 1998 Inaugural Sir Gerard Brennan Lecture, (Bond University, Gold Coast, Australia, 21 February 1998), p. 15.

19 Ibid., p. 15 and p. 17.

This description may be overly pessimistic. Nonetheless, as the separation of powers is based on checks and balances, it is timely to consider any means to strengthen the understanding of how the checks and balances can operate, particularly where one arm of government in a jurisdiction may be more powerful than another. Guidelines and standards both domestically and internationally can assist law-makers, judges and administrators in the proper exercise of their powers.

It raises issues for tax administration. Tax law is complex and voluminous. Revenue authorities are often given extensive discretion. Although the substance of tax law is almost always subject to review by the courts, this is much less the case in its administration. Taxpayers' rights are therefore largely concerned with the effect of tax administration, as it is administered by the revenue authority bureaucracy. They provide useful checks on power.

In democratic jurisdictions there is concern over the extensive power and authority of the executive, through its bureaucracy. It is interesting to note that the IMF and World Bank, in particular, have been providing guidance to numerous countries over a number of years on the reform of their tax systems. Much of this guidance is based on standards developed to best ensure success.[20] Many of these countries are viewed as fledgling democracies. Some would be considered undemocratic.[21] However, the nature and importance of revenue collection is such that even in the most undemocratic countries this is one element of the legal system that all regimes try to ensure operates as efficiently and effectively as possible.[22] Developing countries and those in transition are encouraged in this approach by the IMF and the World Bank, as discussed in Chapter 2. These countries face problems where they have either weak courts or a weak bureaucracy.

As noted by Vanistendael,[23] in some jurisdictions the judicial system does not function effectively and this constitutes, 'a substantial impediment to the rule of law in tax matters'. This problem is compounded if there are flaws in the operation of the legislature and executive. Gordon and Thuronyi suggest that tax reform should take place with appropriate collaboration between the

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20 V. Thuronyi, above n. 14, vol. 1, xxvii.

21 There are numerous agencies charting democratic development. For a listing of many of the better recognised, *see* the Democracy Research Guide, The National Endowment for Democracy, <www.ned.org>, 1 November 2006.

22 For a review of developments in this direction across a range of developing countries, *see* R.M. Bird and M. Casanegra de Jantscher, above n. 13.

23 Above n. 14.

executive and the legislature.[24] They note that this is particularly difficult if there has not yet been the opportunity to properly establish a tax legislative process.[25] It would leave effective responsibility for the legislation and administration of the tax law squarely in the hands of the executive.

In many jurisdictions, without some adherence to the rule of law, corruption flourishes.[26] Even in the most established and stable democracies corrupt practices exist and are routinely the subject of inquiries and commissions. However, the threat to the proper administration of the tax system is most serious in those jurisdictions where bribery and corruption is rife.[27]

Logically, there would therefore be a continuum that begins with countries that have little in the way of the rule of law (even in Neumann's thinnest form, i.e. effective but without moral content) and seek to extract revenue from their citizens by methods generally accepted as inappropriate. This is most commonly seen in countries experiencing civil war. Their lack of success in raising the necessary revenues to support the government's programmes would usually be reflected in their level of economic development. Taxpayers' rights would largely be alien to these jurisdictions, at least in substance if not in form.

Along the continuum there would be other countries that, although not fully democratic or generally known for a strong system of law, nonetheless would have systems in place to ensure collection of revenue. These would usually be accompanied by limited taxpayers' rights, such as the right to appeal against an assessment. Developing countries and countries in transition are often represented in this group.[28] The effectiveness of taxpayers' rights would depend very much on the operation of the procedural rules and safeguards and the respect by administration officials for the system.[29] It is as these

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24 R.K. Gordon and V. Thuronyi, 'The Tax Legislative Process' in V. Thuronyi, above n. 14, 1, p. 7.

25 Ibid., p. 1.

26 Reflected in the work of Transparency International.

27 C.E. McLure, Jnr and S. Pardo R, 'Improving the Administration of the Colombian Income Tax, 1986-88' in R.M. Bird and M. Casanegra de Jantscher, above n. 13, p. 125, p. 135.

28 Ibid., a recurrent theme in R.M. Bird and M. Casanegra de Jantscher.

29 Ibid., p. 135. Even in a generally corrupt system, not all tax officials are necessarily corrupt. In the most authoritarian regime there will be tax officials who interpret the regulations more favourably for taxpayers than others. *See* further, O-H. Fjeldstad and B. Tungodden, 'Fiscal corruption: A vice or virtue', (2003) 31 *World Development*, 1459.

jurisdictions introduce reforms of the tax system that there is most scope for use of a model of taxpayers' rights in guiding the shape of the legislative and administrative framework.

Luoga[30] identifies the factors that both encourage and militate against change, based on research in the context of Tanzanian tax reform. Factors that are likely to prevent change tend to focus strongly on administrators' fear of loss of autocratic control of the tax system and include:[31]

- Fear by bureaucrats of a loss of power, particularly if they perceive limits on their discretion;
- Fear of loss of revenue as taxpayers embrace their newly-found rights to oppose prerogative powers over taxation;
- Fear that carefully cultivated co-operation between government and business that maintains the status quo would be upset; and
- the costs associated with implementation of reform, including the potential invalidation of existing taxes.

Ranged against this focus on retention of control are a range of factors that are likely to precipitate change over time despite the strength of the opposition. Many of these factors are common to both developing and developed countries and some of the more important can be grouped into three broad areas.

The first group flows from the sheer force of change driven by the economic, social and technological environment.[32] As governments are forced to reform their tax policy to cope with these changes, the economic imperative of establishing a broader tax base requires a shift in approach within the tax administration.[33] This drives a response from taxpayers. They become aware the level of tax they pay compared with the public benefits they receive, particularly in developing countries in fiscal crisis, where the impact of change on the taxpayer is greater.[34] If taxpayers are suddenly required to pay substantially more tax, they want to see some benefit for their real sacrifice.

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30 F.D.A.M. Luoga, 'The Viability of Developing Democratic Legal Frameworks for Taxation in Developing Countries: Some Lessons from Tanzanian Tax Reform Experiences' *Law, Social Justice and Global Development* (2002(1)), p. 27, <elj.warwick.ac.uk/global/issue/2003-2/luoga.html>, 6 September 2006.

31 Ibid.

32 K.C. Messere, *Tax Policy in OECD Countries: Choices and Conflicts* (Amsterdam, IBFD Publications BV, 1993), p. 27.

33 R.M. Bird and M. Casanegra de Jantscher, above n. 13, ch. 1.

34 F.D.A.M. Luoga, above n. 30, p. 28.

The second group reflects the broader issues influencing the context for change. The focus on governance, integrity and transparency has forced its way into every area of decision-making. Take three examples: the global response to corporate collapses such as Enron both legislative and through changes to international accounting standards; the response of supranational organizations such as the OECD to issues such as harmful tax competition; and the international implementation of anti-terror legislation. Governments are no longer insulated from international pressure to exhibit at least the semblance of compliance with agreed standards. More specifically for developing countries, aid and loans are increasingly linked to genuine progress on good governance, reflected, for example, in the IMF *Code of Good Practices on Fiscal Transparency*.[35] Luoga relates that in Tanzania public awareness of the requirement for good governance is forcing the government and bureaucrats to broaden public consultation to engender the public cooperation required to implement change.[36]

The third group reflects the development of a more organized public response to change. This has been more obvious in the political changes forced by the public response to dubious elections, as in Ukraine's Orange Revolution of 2004-5 following allegations of endemic corruption, voter intimidation and electoral fraud. Even in the most autocratic regimes, such as Zimbabwe, opposition members of Parliament are emboldened to speak out against the excesses of the ruling regime.[37] Luoga reports that in a developing country such as Tanzania, the growth of multiparty politics has 'invigorated critical scrutiny of government affairs. . . . It means therefore the parliament is becoming more accessible to the public and increasingly receptive to ideas from constituencies in legislating'.[38] Luoga further notes that in developing countries, taxpayers have been more willing to use their capacity to paralyze the state by refusing to collect or pay taxes.[39]

Most jurisdictions are now striving to operate within at least Neumann's thin form of the rule of law. Even if they are not generally regarded as democratic, the demands of foreign investment and the other elements of change identified above increasingly require that their tax systems at least reflect the basic rights expected of a stable tax system.

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35 Available at <www.imf.org/external/np/fad/trans/code.htm>, 6 September 2006.

36 F.D.A.M. Luoga, above n. 30, p. 28.

37 *See e.g.*, the major amendments to the new constitution of 2005 proposed by the Movement for Democratic Change (but rejected by the Government) to incorporate stringent human rights protections. Second Reading of the Constitution Amendment 17 Bill in Parliament, Tuesday 23 August 2005, Hansard (Zimbabwe).

38 F.D.A.M. Luoga, above n. 30, p. 29.

39 Ibid.

Progress on one front, however, is countered by deterioration of taxpayers' rights on another. Many jurisdictions, even though they may not have mature or effective judiciaries, will experience the domination of the executive in the development of their tax system in the way identified by Sir Gerard Brennan and Lord Hailsham. This experience will grow with the plethora of rule-making that is increasingly a feature of modern society. The advantage of mature democracies is that they at least have the benefit of an active legislature and the generally effective operation of the rule of law to support taxpayers' rights. However, even the most mature democracies cannot always rely on their current systems to ensure taxpayer protection, given the volume of rules that require implementation.[40] The development of accepted standards of administration provides a useful set of arguments against excessive exercise of power.

III. The context for a model: increasing protection

Tax administration is notorious for its complexity and, often, its lack of accountability.[41] One only has to review the search and seizure legislation in a number of jurisdictions, to see the significant powers of tax administrators.[42] On the other hand, revenues must be collected to fund governments. There is a tension that will grow with advances in technology, and as societies become increasingly international in content and outlook.

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[40] It is widely recognised as a problem. *See*, for example, the Australian Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006 designed to reduce the sheer volume of legislation in use. The problem is discussed in J. Corkery, 'On Literalism, Rule of Law and Due Process' (2003) 13 *Revenue Law Journal*, 1, and in relation to international complexity and tax compliance: D.R. Tillinghast, 'Issues of International Tax Enforcement', in H.J. Aaron and J. Slemrod (eds.), *The Crisis in Tax Administration* (Washington D.C., Brookings Institution Press, 2004), p. 38.

[41] One proposal for improving this situation is to make the tax authority independent from the executive and accountable directly to parliament. *See*, *e.g.*, R. Taliercio, *Designing performance: the semi-autonomous revenue authority model in Africa and Latin America*, Policy Research working paper series No. WPS 3423 (Washington DC, World Bank, 2004); C. Campbell and M. Berry, 'Back to the Future: Is it Time to put Revenue Canada into Commission?' (1995) 43 *Canadian Tax Journal*, 1901; G.P. Jenkins, 'Modernization of Tax Administrations: Revenue Boards and Privatization as Instruments for Change' (1994) 48 *IBFD Bulletin* 75; and <www.itdweb.org>, 6 September 2006.

[42] Discussed further in Chapter 8.

For those governments most focused on the preservation of the rule of law with a broader content, they protect their citizens with a constitutionally entrenched bill of rights. As the executive arm of government inevitably becomes more powerful in order to cope with the speed of change, these governments recognise that it is no longer sufficient that citizens should have to rely for the protection of their basic rights on limited statutes and administrative conventions.[43] This may not be the only answer to provide some form of safety net for citizens in the face of the growth of executive power. However, it is increasingly popular, as seen in the implementation of Bills of Rights in Canada, New Zealand, South Africa and the United Kingdom.[44]

To state that such matters fall outside the scope of a discussion pertaining to taxation is to ignore the fact that taxation laws affect every transaction undertaken. The beneficial effect of legislation such as the Canadian Charter and the South African Constitution is that they provide clear legal parameters within which the revenue laws must operate. This provides guidance for the executive as it seeks to maintain its revenue base in an international environment where taxpayers and other governments are trying to erode it for their own advantage. In desperate times, governments take desperate measures.[45] A general bill of rights assists in the operation of the rule of law in revenue matters.

Against this backdrop, the power of executive arms of government will inevitably increase as society and government becomes more complex. The legislative arms of government will pursue more vigorously their role as the monitor of legislation.[46] They will introduce more rigorous requirements that statutory instruments and other regulations are laid before them for comment. There will be more review by standing committees.[47] Regulations will be

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43 *See further* on this theme, D. Goldberg, QC, 'Between the Taxpayer and the Executive; Law's Inadequacy; Democracy's Failure?' [1996] *British Tax Review*, 9.

44 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982; New Zealand Bill of Rights Act 1990; Chapter 2, Constitution of the Republic of South Africa 1996; and UK Human Rights Act 1998.

45 And always have: *see* B. Bartlett, 'How Excessive Government Killed Ancient Rome' (1994) 14 (2) *Cato Journal*, 287.

46 This was seen in particular in the US with the passage of the so-called Taxpayer Bills of Rights amendments to the Internal Revenue Code: A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998), p. 347.

47 For a useful description of the changing balance of power in Westminster systems, *see* Sir G. Brennan, 'The Parliament, The Executive and the Courts: Roles and Immunities', *The Brennan Lectures 1998-2001*, (Gold Coast, Bond University, 2003),

subject to sunset clauses.[48] However, the lack of time and expertise of members of parliaments may limit their effectiveness.[49] The role of courts will remain largely that of interpreting substantive law, with a few exceptions perhaps in the context of interpretation of bills of rights. The courts will try to maintain due process, but against a backdrop of their limited ability to interfere with the exercise of administrative discretion. Their significant influence will remain largely confined to the broader policy issues found in bills of rights. However, their interpretation of these rights has the potential to shape the way that the executive exercises its growing powers.

The significant step forward is the growing focus by governments on their responsibility to their citizens and the need to introduce broad administrative protection against abuse of power. This trend is likely to continue. A concern is that it may do so at the expense of rights that are independently created and administered. Administrative due process will be effective for most citizens, who will not notice the gradual increase in executive power. They will accept the arguments that governments need wider powers to protect law-abiding citizens.[50] However, administrative protection is likely not to spread widely enough to protect those citizens who fall, whether innocently or not, outside the standard operation of government administration.

Valerie Braithwaite argues cogently however, that it is incumbent upon revenue authorities to preserve the democratic order by upholding tax system integrity and creating the environment to maximize taxpayer compliance.[51] She suggests that integrity of the system means that, 'in return for taxes, taxpayers should not only receive goods and services, but also sound governance that is respectful and protective of democratic principles and

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p. 2. On the effectiveness of standing committees in a Westminster system, *see* H. Barnett, *Constitutional and Administrative Law* (3rd edn., London, Cavendish Publishing Ltd, 2001), pp. 619 *et seq.*

[48] It has become a policy commitment for some governments. For example, *see* in the UK, The Better Regulation Task Force, Annual Report 2000-2001, p. 19, <www.brc.gov.uk>, 1 November 2006.

[49] An interesting response to this concern is found in the Canadian Library of Parliament, *Strategies for Effective Members in an Effective Parliament: Report on Four Seminars for New Members of the 38th Parliament,* <www.parl.gc.ca/information/library>, 1 November 2006.

[50] As has occurred internationally with the introduction in several jurisdictions of anti-terrorism legislation that impacts on civil liberties.

[51] 'Tax System Integrity and Compliance: The Democratic Management of the Tax System' in V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot, Ashgate, 2003), p. 271.

processes'.[52] Given the nature of a democracy, she asserts that institutional engagement through education and persuasion should be combined with a commitment to 'convert democratically responsive principles of action into concrete operations and routines in the day-to-day practices of tax officers'.[53]

This view is shared increasingly by tax authorities. For example, a past Australian Commissioner of Taxation, Michael Carmody, regularly expressed the view that:[54]

> The community has the right to expect that we are there to protect their interest within the terms of the law and to promote with government changes to the law where that interest is being challenged. . . . If we are to have the community's confidence in their tax administration it is essential they know how we are operating, what to expect of us in their individual dealings with us and also that there are accessible avenues to seek redress where they do not believe we are acting according to the standards we profess.

It is an approach reflected in the Australian Commonwealth Treasury's Review of Aspects of Income Tax Self Assessment, which recommended a number of refinements to the Australian tax system.[55] These, it suggested, would redress the balance of fairness in favour of the taxpayer and make the tax system more flexible.[56]

There is recognition that with the expansion of government, increased responsibility is placed on the executive in its administration of the laws. Revenue authorities, as Braithwaite argues, play a particularly important role in safeguarding democracy and the rule of law. Although the scope of legal protection is broadened at the highest levels, the day-to-day administration of the tax rules and processes falls increasingly within the discretion of the executive, so that legal constraint is limited and difficult to enforce. Fortunately, the revenue authorities in many jurisdictions have recognized their responsibility to maintain the integrity of the system. Cynics argue that this may be in part

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52 Ibid.

53 Ibid., p. 275.

54 M. Carmody, 'Future Directions in Tax Administration or Community Confidence: The Essential Building Block' in C. Evans and A. Greenbaum (eds.), *Tax Administration: Facing the Challenges of the Future* (Sydney, Prospect, 1998), p. 255, p. 257 and p. 261.

55 Australian Government, *Report on Aspects of Income Tax Self-Assessment* (Canberra, 2004), <www.selfassessment.treasury.gov.au>, 6 September 2006.

56 Ibid., p. 5.

because it increases taxpayer compliance and enables them to perform better against their targets. Nonetheless, these revenue authorities are demonstrating the 'basic respect for the democratic principles of participation and accountability' that legitimates their actions.[57] In doing so, they are increasingly co-operating to develop appropriate standards of tax administration.

The context discloses therefore that there is increasing recognition of taxpayers' rights. This is flowing in two directions. The first is an increase in recognition of fundamental rights in the context of bills of rights and similar instruments. The second is in the context of the expansion of administrative protection of rights, given the limits on general legal protection of taxpayers' rights in the day-to-day application of the tax rules and processes. Development of acceptable standards of taxpayers' rights is therefore timely and beneficial. However, it is also important to consider the content of the rights. As will be seen in the discussion below, the manner of enforcement can have a significant effect on the content of a right, underlining the importance of current trends.

IV. An overview of types of rights[58]

Taxpayer protection varies, depending upon the rights to be protected and the method of enforcement used to provide that protection. Usually, methods of enforcement flow naturally from the rights that a society sees as needing protection. The first question is: what rights are protected? The list is long. For simplicity, we can identify two main types of rights, which can then be broken down into different classes, according to their method of enforcement.

The first type of right encompasses the ordinary rights of most taxpayers who attempt to comply with the law and want to see fairness and efficiency in the daily operation of the tax administration, collection and enforcement process. These rights tend to occur at the interface between the tax collection authority and the taxpayer, and focus on process.

Rights of this kind are protected by both legislative and administrative measures, but, as discussed below, the scope of the rights depends largely on the nature of enforcement. The charters of taxpayers' rights in Canada,

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57 V. Braithwaite, above n. 51, p. 287.

58 The classification of rights put forward in this section has had a long gestation and was first set out in D. Bentley, 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules', above n. 17, on which much of this part is based.

New Zealand and Australia, for example, all state that the revenue authorities will respect the confidentiality of taxpayer information on an administrative basis. Yet, in all those jurisdictions, there are also legislated secrecy provisions applicable to officers of the revenue collection authority, prohibiting them from disseminating information concerning taxpayers that they have access to because of their work.[59]

The second type of right encompasses those rights that relate to the specific validity, operation and application of the tax law. Rights of this kind tend to arise at the interface between the tax law and the taxpayer.[60] They are enforced by law and focus on the fundamental operation of the law and its substance. As such, they usually apply generally, and not simply to tax law.[61] An example would be a requirement that laws should not discriminate.

Some would argue that there is a third type of right: the right to a standard of service and treatment by the tax authority. However, as discussed below, although these so-called rights are included in taxpayers' charters they are goals, expectations or promises. They are administrative in character.

Taxpayers' rights of the same kind can be protected by both administrative and legislative mechanisms.[62] However, as the mechanism affects the scope and nature of the right, it is important to identify the form of protection and enforcement.

For example, in Germany, procedural rights that govern the operation of revenue administration are given detailed statutory enforcement.[63] One of the main advantages for taxpayers is that statutory protection provides a right of

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[59] Some countries have a variety of protection, but *see e.g.*, in the United Kingdom, the Official Secrets Act; in Canada, Income Tax Act, s. 241; in New Zealand, Tax Administration Act 1994, s. 81; and in Australia, Income Tax Assessment Act 1936 (Cth), s. 16.

[60] Traditionally, taxpayer rights were considered almost exclusively in relation to the powers of tax authorities and taxpayer rights of review and appeal. This began to expand, *e.g.*, in Organization for Economic Cooperation and Development, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (OECD, 1990), and D. Albregtse and H.P.A.M. van Arendonk (eds.), *Taxpayer Protection in the European Union* (The Hague/London/Boston, Kluwer Law International, 1998).

[61] As seen in formal human rights legislation in Hong Kong, Canada and New Zealand.

[62] As has been done in the USA and France.

[63] In the German Fiscal Code (Abgabenordnung). The rights are discussed by C. Daiber, 'Protection of Taxpayers' Rights in Germany' in D. Bentley, above n. 46, p. 152.

appeal to a court.[64] In Australia, the same rights are given administrative protection only. The right of appeal against administrative action is, in most jurisdictions, limited to right of review of the decision-making process: that does not protect taxpayer rights in the courts; it simply ensures that administrative decisions follow the rules of natural justice (in the broad meaning of the term). So, administrative protection has to rely on alternative mechanisms, such as an ombudsman or problem resolution units within the revenue authority.

In most jurisdictions, there is a separation of powers between the judicial, the legislative and the executive arms of government. The perceived benefit of legislative enforcement of rights centres on this separation, and the right of the courts to question the executive's interpretation of the rights that the legislature has given to taxpayers. However, legislative enforcement is a broad policy tool that does not usually cover the rights that fall within the detailed administration of a tax system.

On the other hand, administrative enforcement of taxpayers' rights depends upon the executive arm of government and usually exists at the discretion of the executive. Administratively enforced rights cannot be claimed before either the judiciary in its decision-making role, or the legislature in its formulation of the tax law. In other words, a tax authority may provide protection of rights to taxpayers, but usually the exercise of the protection and the existence of that protection remain at the discretion of that authority. Many administrative concessions to taxpayers given by tax authorities operate in this way and they can provide rights beyond the scope of those provided legislatively. For example, in the United Kingdom the Inland Revenue has, from time-to-time, issued extra-statutory concessions. They permit taxpayers to ignore the normal operation of the law, where there are anomalies that produce unlooked for consequences. Extra-statutory concessions exist solely at the discretion of the Inland Revenue.[65]

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64 OECD, above n. 60, p. 21.

65 Although the courts have suggested that there is no legal basis for extra-statutory concessions, *Vestey and Others v. IRC, (No. 2)* [1979] 3 WLR 915, they have gained some acceptance. *See* S. Eden, 'Judicial control of tax negotiation' paper presented at the 6th International Conference on Tax Administration, Atax (Sydney, 15-16 April 2004). Discussed further in D. Williams, 'United Kingdom tax collection: rights of and against taxpayers', in D. Bentley, above n. 46, and A. Rowland, 'Is the Revenue Being Fair? Revenue Statements and Judicial Review' [1995] *British Tax Review*, 115. Another example is the use of circulars to effect tax law in Japan: *see* T. Okamura, 'Due Process and the Taxpayer' (1993) 11 *International Tax and Business Law*, 125.

Administrative and legislative enforcement combine to form a complementary and comprehensive framework for the protection of taxpayer rights. By themselves the protection they give is limited. This becomes apparent through the classification of rights.

A. A classification

An analysis of taxpayers' rights is helped by further classification. Otherwise there is too much variation within each of the types of rights and their method of protection for meaningful analysis. The classification that follows provides the practical means to examine the main groups of rights within each type.

Primary legal rights focus on the process of law making, and what makes a tax law a valid law. It may be that for a tax law to be valid it must comply with certain criteria. For example, a tax law may have to be clear in its imposition of a tax; it may have to be certain; there may be limits on its retrospective application. In this way, primary legal rights are interpreted by the judiciary, and constrain the actions of the executive and the legislature.

At the next level of classification there are enforceable taxpayers' rights. Secondary legal rights focus on the specific operation of the law. They are concerned with the protection of rights at both a general and specific level. At a general level, rights will provide a standard for the operation of the administration, collection and enforcement processes within the law. For example, there may be rights requiring the confidentiality of information provided to the revenue authorities or that every taxpayer should have the right to a fair and impartial hearing in relation to any tax dispute.

At the specific level, secondary legal rights protect taxpayers in the context of individual procedures and specific processes within the law. An example of a right relating to an individual procedure would be where the revenue authority makes a decision, and there is a requirement to provide reasons for that particular decision. A right relating to a specific process would be where there are rules governing the way that the revenue authority considers an application for an advance ruling and how such a ruling is to be made.

It is also possible to protect elements of secondary legal rights administratively. The mode of protection depends largely on the approach of the authorities in the relevant jurisdiction. Where rights of this kind are protected administratively, they are called primary administrative rights, as they are also enforceable rights. The nature of secondary legal rights and primary administrative rights does differ, even though they may appear to provide the same protection.

For example, take legal professional privilege. It is a right protected by statute or at common law in many jurisdictions. In its basic form, it provides professional privilege in respect of documents passing between lawyers and their clients in certain situations.[66] Professional privilege can also be given administrative protection. For example, in Australia, only lawyers can claim legal professional privilege. By an administrative concession, the Commissioner of Taxation has extended similar rights to certain documents passing between professional accountants and their clients.[67] Lawyers can claim a narrow privilege that is defined and protected by the judiciary, and that can only be overridden by the legislature. Accountants can claim a broader privilege that is given at the discretion of the Commissioner of Taxation, and that can be withdrawn by the Commissioner of Taxation at any time. The difference between the rights in this example illustrates the fact that legal rights at this level tend to be narrower in scope than administrative rights purporting to cover the same ground.

Secondary administrative rights are rights that could not be legislated efficiently and that are given in the context of detailed processes. An example would be where taxpayers are given the right to receive timely assistance from the revenue authority where they seek help in meeting their taxation obligations. This is a more subjective right than the requirement to give reasons for a decision. It is concerned with how the agents and employees of a revenue authority conduct themselves when they provide services to taxpayers. Administrative implementation and enforcement is far more appropriate than an attempt to legislate protection of such rights.

There are other administrative rights that are not rights at all, but expectations, social rules, or performance indicators, often described as rights. They are common in administrative charters. For example, a charter may state that a taxpayer has a right to polite service and courteous treatment by revenue authority employees. This is a performance measure and cannot easily be enforced by the taxpayer. Any assessment as to whether the expectation has been met is necessarily subjective. It cannot be translated into a legal rule.

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66 Set out, for example, in the Australian cases of *Grant v. Downs*, (1976) 135 CLR 674 and *Baker v. Campbell*, (1983) 153 CLR 52; in Canada, *Solonsky v. Canada*, (1979) 105 DLR (3d) 745, pp. 755-757; in Germany, the German Fiscal Code, *Abgabenordnung*, s. 102(1); in New Zealand, *Commissioner of Inland Revenue v. West-Walker*, [1954] NZLR 191, p. 219; and in the US, *Fisher v. United States*, 425 US 391, p. 403 (1976).

67 ATO, Access and Information Gathering Manual and ATO, Guidelines to Accessing Professional Accounting Advisors' Papers, <www.ato.gov.au>, 1 October 2006.

On the one hand, it is a social rule that taxpayers would like tax officers to follow, which if they do not, constitutes a breach of social etiquette. On the other it is a management tool and may be accompanied by a specific performance indicator. Breach of the rule will usually result in complaint, a demand for conformity with the rule by the taxpayer and/or the revenue officer's manager, and in this instance, a return to polite treatment. There is a general acknowledgment in society that such complaints and demands are justified.[68] However, the nature of the rule remains social and not legal.

These social rules have become increasingly important as a reflection of the mutuality of the relationship that is now becoming commonplace in many jurisdictions between taxpayers and the revenue authority.[69] They comprise a substantial component of any document issued by a revenue authority that sets out the rights and obligations of taxpayers. Secondary administrative rights and rights that are effectively social rules or unenforceable administrative goals are perhaps most usefully classified as principles of good practice.

B. Application

With a classification system in place, it is simpler to make sense of the different types of rights that are given in different jurisdictions. It is also easier to understand why authorities have chosen the rights they have in the light of the mechanisms that they use for enforcement. The next section examines the effectiveness of the classification system.

V. Classifying taxpayers' rights

A classification system must allow a clear analysis, not only of the type of right, but also its effect. Otherwise it is very difficult to understand the true

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[68] H.L.A. Hart explored this idea in *The Concept of Law* (2nd edn., Oxford, Clarendon Press, 1994), p. 55.

[69] Reflected in the terminology used in tax documents. In Australia, the Income Tax Assessment Act 1997 (Cth) was drafted to reflect this relationship and the term 'the taxpayer' was replaced with the more friendly 'you'. This despite the fact that the number of taxpayers reading the legislation is minimal. However, it represents the quantum change in approach in the ATO. *See further*, M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22, and pp. 29-31.

content of any right. To provide a clear understanding of the operation of the classification system this section works through examples to illustrate each type of right. Chapter 5 then explores in some detail the methods of enforcement of legal and administrative rights. Chapters 6 to 8 detail the rights of each kind that should be included in a Model.

A. Enforceable taxpayers' rights: primary legal rights

Primary legal rights are concerned with specific requirements of valid tax law. Some are covered in the constitution, others through supranational instruments. The remainder form part of the general body of legislation. Returning briefly to Neumann's analysis of the rule of law, the thin and thick conceptions of the rule of law are useful in determining the nature and extent of some rights. The thick conception includes a significant moral content and incorporates the principles discussed in Chapter 3. The thin conception can be used to identify the basic rules that are required for a valid law.[70] This is explored further in Chapter 6.

1. Constitutional protection

Constitutions provide the strongest form of primary legal right enforceable by law. Some jurisdictions, such as the United Kingdom, do not have written constitutions. Others do have constitutions and these may or may not include express protection of rights. Australia provides an example of a constitution with some express and some implied rights.[71] Such constitutional rights are usually only indirectly related to taxation, but can underpin the basic framework for the operation of tax administration, collection and enforcement.

For example, the Swedish Constitution does not contain many express rights, but there is a prohibition against the retroactive effect of tax statutes.[72]

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[70] Neumann argues that both Fuller and Raz adopt the thin conception. M. Neumann, above n. 6, p. 7.

[71] Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in P. Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), p. 454

[72] Chapter 2, para. 10 Regeringsformen, 1974 (Sweden). *See further* A. Hultqvist, 'Taxpayers' Rights in Sweden' in D. Bentley, above n. 46.

It requires Parliament to pass a tax statute into law before the new law can have the effect of taxing transactions. However it is substantially watered down by an exception. This allows proposed legislation to have effect from the date that detail of any new legislation is provided to Parliament. Nonetheless, the details required are sufficient to provide taxpayers with warning as to the content of new legislation. The revenue base is protected from taxpayers taking advantage of loopholes in the law between the time a change is announced and when it is passed into law. Taxpayers are protected from the retroactive effect of tax legislation in the form of a primary legal right. It goes beyond the practice in many countries, where the government provides a warning, in the form of an announcement, that the law will change in an area of the tax law, and also advises that any changes that eventuate will take effect from the date of the announcement.[73]

The German constitution provides a number of rights to taxpayers (although it does not contain a bill of rights).[74] For example, Article 3 requires there to be equality before the law. As it applies to taxation, the Constitutional Court has interpreted this article to mean that those with an equal ability to pay tax should bear the same tax burden. The Court has held that a tax on real estate breached this principle, as it placed a heavier tax burden on the relevant taxpayers than they would have borne had they invested in other forms of property.[75] Tax applicable to investment income was also found to breach the equality principle, as there was no mechanism in place to enforce withholding tax on interest, thereby favouring it as a form of investment.[76] The German constitution also protects information, privacy, property, and a right of appeal.[77] Clearly, taxpayers are protected, not simply in the procedures available within the tax system, but also in the substance of the tax law, which must comply with basic constitutional principles to be effective.

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73 Discussed comprehensively in C. Sampford, *Retrospectivity and the Rule of Law* (Oxford, OUP, 2006), p. 156 *et seq.* In Australia, awareness of this problem has lessened the instances over time but there is no primary legal right preventing it. In the past, taxpayers have sometimes waited well over a year for the detail of legislation to be revealed that was already supposed to be governing everyday transactions. For example, legislation governing the tax treatment of employee share schemes took 20 months from its announcement in the 1994 Budget to the passing of the Taxation Laws Amendment Bill (No. 2), 1995.

74 *See* C. Daiber, above n. 63.

75 2 Bvl 37/91 of 22 June 1995, BStBL II 1995, 655.

76 27 June 1991, BVerfGE, vol. 84, p. 239.

77 *See* C. Daiber, above n. 63.

Constitutional bills of rights, to the extent they apply to taxpayers, provide a stronger form of protection for primary legal rights. Canada and South Africa provide examples. Li writes, 'The Charter is the supreme law in Canada. Its effect on Canadian law and legal development has been profound. The area of taxation is no exception'.[78] The fundamental rights entrenched in Chapter 3 of the South African Constitution have had a similar impact.[79] In both countries the introduction of a bill of rights has resulted in the amendment of the income tax law to remove conflicting provisions.

However, the content of primary legal rights differs between jurisdictions, as noted in Chapter 2 in the discussion of the diversity of tax systems. For example, the Supreme Court of Canada has not followed the liberal approach of the German Constitutional Court to equal treatment. It has been reluctant to find that provisions of the income tax law breach constitutional rights, and has taken the view that the essence of the income tax law is 'to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests'.[80] In *Symes v. The Queen*,[81] to take one example, the Supreme Court held that a restriction on the amount of deduction of childcare expenses did not have a disproportionate impact on women to the extent that it breached s. 15 of the Canadian Charter of Rights and Freedoms (Canadian Charter). Taking a rather narrow approach, as compared with the German Constitutional Court, 'it held that although women were more likely to bear the social costs of child care, there was no evidence that women were more likely to bear the financial costs of child care, and that s. 63 affected only the financial costs of child care'.[82]

However, there is some element of convergence as judges take into account the development of the law in other jurisdictions. The South African Constitutional Court has tended to look more towards North American decisions for guidance than to European decisions. This is not surprising given the closeness in much of the content of the South African and Canadian bills of rights.

For example, application of s. 8 of the Canadian Charter, the right to privacy, resulted in the restriction of Revenue Canada's powers of search and seizure, and amendment of the relevant provisions of the Canadian Income

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78 J. Li, 'Taxpayers' Rights in Canada' in D. Bentley, above n. 46.

79 R.C. Williams, ' ''Taxpayers'' Rights in South Africa' in D. Bentley, above n. 65, p. 282.

80 *Thibaudeau v. Canada,* [1995] 1 CTC 212, 392.

81 [1994] 1 CTC 40. *See* the general discussion in J. Li, above n. 78.

82 J. Li, Ibid.

Tax Act.[83] Certain requirements were introduced to satisfy s. 8, including the need for prior judicial authorization for any search, and that the judge must have discretion as to whether a search warrant should be granted. South Africa has strong search and seizure powers available to revenue officials under its Income Tax Act. They reflect those in its Investigation of Serious Offences Act, which were challenged under the privacy provision in the Constitution, in *DA Park-Ross v. The Director, Office for the Investigation of Serious Economic Offences*.[84] The right to privacy is similar to that in the Canadian Charter, and the court turned to the Canadian jurisprudence for assistance in determining 'whether the search and seizure provisions of the Act impaired the right of privacy no more than was necessary to achieve the objective of the Act'.[85]

On the basis of the Canadian decision in *Hunter v. Southam*,[86] the court found that the search and seizure provisions were unconstitutional. It did so on the grounds that there was no 'prior authorization of the search and seizure, usually in the form of a warrant, by an impartial and independent person who was bound to act judicially in so doing'.[87]

The courts in Canada and South Africa may not take a broad approach to substantive matters, but, as can be seen from these few examples, they do try to give effect to the purpose of the Charter in procedural matters. It is pertinent to note the difference in protection afforded primary legal rights between jurisdictions with and without bills of rights. Both Canada and South Africa had search and seizure powers in their Income Tax Acts similar to those in most common law countries that did not require prior judicial authorization of searches by revenue authorities. This approach can be contrasted with a Civil Law country, such as Sweden, where there is a tradition of requiring court approval for investigations involving search and seizure. There, the concern is that even this is insufficient, which means that the existence of a right of action under the European Convention of Human Rights is seen by commentators as very important.[88]

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83 Ibid., and *see* R.C. Williams, above n. 79. The Canadian Income Tax Act, s. 231, was amended in 1986 and then again in 1994 in an effort to comply with the requirements laid down by the Supreme Court of Canada in *MNR v. Kruger Inc,* [1984] CTC 506 and *Baron v. Canada*, [1993] 1 CTC 111.

84 1995 (2) SA 198 (C).

85 R.C. Williams, above n. 79.

86 (1985) 14 SCC (3d) 97 SCC.

87 R.C. Williams, above n. 79.

88 A. Hultqvist, above n. 72.

It underlines the increasing influence of supranational protection on primary legal rights. The legal basis for taxpayer protection is broadening. As with constitutional protection, it is often only indirectly applicable to taxation, but the effect is becoming more apparent.

2. Supranational protection

Supranational protection comes in two main forms: where a treaty automatically has the force of law within a participating state, and where a treaty has to be translated into domestic law before it is recognized by the municipal courts.[89] There is little consistency in approach, but the distinction is important, as the right of a taxpayer to claim a right depends upon recognition by a municipal court that the taxpayer can make such a claim.

Most common law jurisdictions require that 'treaties cannot operate of themselves within the state, but require the passing of an enabling statute'.[90] In contrast, Article VI Section 2 of the United States Constitution provides that a ratified treaty immediately becomes part of municipal law, without further enabling legislation. The Netherlands, France and Germany all accept that treaties form a part of the domestic law. However, where the Netherlands requires no translation,[91] both France[92] and Germany[93] may require enabling legislation if treaty provisions require domestic action for them to have effect.

Treaties often require that the provisions should apply in the domestic law of the signatories. For example, the members of the European Union have all had to give direct municipal effect to the provisions of the Treaty of European Union. This means that the provisions may be invoked by individuals in municipal courts. Judicial acceptance of this principal is based, fittingly, in a tax case.

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89 Important here is not so much the monist and dualist debate, but rather the process by which treaties are recognised in municipal law.

90 M.N. Shaw, *International Law* (3rd edn., Cambridge, Cambridge University Press, 1995), p. 114 and p. 123. Expressed by Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326, 347-348.

91 Under Art. 94 of the Netherlands Constitution, if a statute conflicts with a treaty provision, taxpayers may claim its non-applicability. *See* R. Sommerhalder, 'Taxpayer Rights in the Netherlands' in D. Bentley, above n. 46.

92 M.N. Shaw, above n. 90, p. 125.

93 Art. 59 of the Basic Law.

In *Van Gend en Loos v. Nederlandse Administratie der Belastingen*,[94] a chemical product was imported into the Netherlands from Germany. The rate of import duty was challenged under Article 12 of the Treaty establishing the European Economic Community. It was argued that the chemical product was reclassified by the Netherlands customs authorities, effectively increasing the duty — a result that was prohibited under Article 12. The Government of the Netherlands submitted that individuals could not invoke the provisions of the Treaty. The European Court of Justice found that the Treaty imposed obligations and also conferred rights on individuals. The rights conferred can be both express and implied.[95]

The effect for taxpayers is to extend their protection beyond the provisions of their own jurisdiction. The European Union Treaty (EU Treaty) provides an interesting example of the effect of a regional trade agreement, albeit the most pervasive and sophisticated of its kind. The economic focus means that protection under the Treaty is often more applicable to taxpayers than those under specific human rights treaties. Many of the leading cases under the EU Treaty consider discrimination between EU Member States. It is a considerable advance in right protection that individuals can bring their governments to a supranational court, which can require those governments to give effect to the principles embodied in an international treaty.

Of the numerous tax cases under the EU Treaty, a small sample illustrates the kind of protection of primary legal rights available to EU taxpayers.[96] In a leading case from 1983, the *Avoir Fiscal Case*,[97] the European Court of Justice found that the French Government was discriminating against branches and agencies established in France by insurance companies based in other Member States. Branches and agencies established in France were not able to utilise shareholders' tax credits on the same terms as could French companies. The Court held that this was a breach of the EU Treaty, especially the freedom of establishment (Art. 52 EU-Treaty). The regional economic focus is clear. The EU Treaty did not allow outright discrimination by a Member State in favour of its own nationals even in tax cases. This was reflected in two later

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94 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1, [1970] CMLR 105.

95 *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 [1963] ECR 1, 12, [1963] CMLR 105, 129.

96 For a more comprehensive review of the effect of the EU Treaty, examined from the context of Germany, *see* C. Daiber, above n. 63.

97 *Commission v. France*, Case C270/83 [1986] ECR 273.

cases: *Biehl v. Luxembourg*[98] and *R v. Inland Revenue Commissioners, Ex parte Commerzbank AG*.[99] In both cases, the European Court of Justice found that Member States could not deny the right to repayment of overpaid tax, if that denial only applied to non-residents. Such action was discriminatory and a breach of the EU Treaty. A similar approach was taken in cases where employees were denied tax deductions because they were not resident in a Member State,[100] and where companies were denied the deduction of tax losses.[101] They uphold the principle of inter-nation equity, discussed in Chapter 2.

Although the European Court of Justice provides support for primary legal rights, in most cases even within the EU the support is limited. The EU Treaty provides for laws to be made by the Council and Commission of the European Union, mainly in the form of regulations and directives.[102] A primary aim is to harmonize the law of the Member States. As James and Oats have stated, 'the main aim of corporate tax harmonization is to reduce, if not remove, distortions arising as a result of cross border investment'.[103] However, larger economic concerns are of little help to the taxpayer. The taxpayer is concerned with the protection from discrimination that is available in a court of law when harmonization is given effect. This will only happen where a Directive is self-executing and intends to give rights to individuals.[104] Because tax harmonization is primarily concerned with eliminating distortions between systems, most Directives are unlikely to provide rights sufficiently detailed for taxpayers to rely on.[105] Supranational support for primary legal rights should therefore not be overstated.

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98 *Biehl v. Administration des contributions du grand duché de Luxembourg*, Case C175/88 [1990] ECR I-1779.

99 *R v. Inland Revenue Commissioners, Ex parte Commerzbank AG*, Case C330/91 [1993] ECR I-4017.

100 For example, *Martin Bachmann v. Belgium*, Case C204/90 1992 ECR I-249; *Commission of the European Communities v. Belgium*, Case C300/90 [1992] ECR I-305; and *Finanzamt Köln-Altstadt v. Schumacker*, Case C209/93 [1995] ECR I-225. *See further*, C. Daiber, above n. 63, and J. S. Schwarz, 'Tax Discrimination — Trends in Europe' (1995) 8 *SA Tax Review*, 91.

101 *Marks and Spencer plc v. Halsey (HM Inspector of Taxes)*, Case C-446/03 [2006] Ch 184.

102 Art. 249 of the Treaty establishing the European Community.

103 S. James and L. Oats, 'Tax Harmonization and the Case of Corporate Taxation' (1998) 8 *Revenue Law Journal,* 36.

104 *See* C. Daiber, above n. 63.

105 Directives that relate to tax include the Merger Directive (434/90/EC), the Parent-Subsidiary Directive (435/90/EC), and the Directive on Mutual Assistance Between Member States of the European Union (799/77/EC).

Regional trade agreements are one source of support for primary legal rights. Human rights treaties are another. The European Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights (ECHR), has been signed by all member states of the Council of Europe and is incorporated into the law of the European Union by virtue of Article F(2) of the EU Treaty. This Article requires that members of the EU 'shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.[106] How the signatories to the ECHR, including the members of the European Union, ensure the protection of the guaranteed rights is left to the individual states.

As with most human rights treaties, the scope is limited within the ECHR for protection of rights relating to taxpayers. Article 1 of Protocol 1 of the ECHR specifically provides for states to secure payment of taxes. The Convention tends to apply to taxpayers where the application of the tax law breaches another protected right, for example, where criminal provisions apply to a taxpayer and there is a question as to whether the taxpayer has received a fair trial.[107] More extreme taxpayer positions that inevitably appear from time to time, have been rejected. Article 9 of the ECHR provides for the right to freedom of thought, conscience and religion. The European Commission[108] found that tax paid by a Quaker could be used for defence purposes, whatever the concerns of the Quaker.[109] Court jurisprudence suggests that Article 9 does not extend to where a state has a neutral institution or practice that requires an individual to participate in an activity that is inimical to the

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106 D. Williams, above n. 65. *See also*, D. Williams, *EC Tax Law* (London, Longman, 1988), pp. 19-20.

107 The operation and interpretation of the ECHR is discussed in M. O'Boyle, C. Warbrick, E. Bates, D.J. Harris, *Law of the European Convention on Human Rights* (2nd edn., UK, LexisNexis, 2005), and C. Ovey, and R. White, 'Jacobs and White, The European Convention on Human Rights' (4th edn., Oxford, OUP, 2006).

108 The European Commission for Human Rights can hear a case only if national remedies have been exhausted. It provides a report in which it gives an opinion as to whether there has been an infringement of the ECHR. Only then can the case be heard by the European Court of Human Rights, and many cases are settled once the opinion of the Commission is given.

109 *C v. United Kingdom*, Case No. 10358/83 (1983) 37 DR 142.

individual's belief, however conscientiously held.[110] For the most part, the cases have held that taxes do not relate to conscience, but apply neutrally and generally in the public sphere.[111]

Where the ECHR has been influential in the tax context, is to ensure that there are procedural safeguards available to taxpayers, and proportionality in the treatment of taxpayers. Article 1 of Protocol 1 of the ECHR gives states a wide margin of appreciation in the way they secure payment of taxes. But the European Court of Human Rights has found in favour of taxpayers where it feels that a state's actions have upset the balance of interests between the individual and the state.[112]

For example, Article 6 of the ECHR protects the right to a fair trial, but it does not mention the right to silence or the right not to incriminate oneself. Yet, in *Funke v. France*, these rights were found to be necessary for a fair trial, in the context of a customs investigation.[113] The right was earlier found to be broad enough to govern the provision of information about business records and legal persons.[114] The Court in *Funke* held that, 'the relevant legislation and practice must afford adequate and effective safeguards against abuse'.[115] The facts showed that, in relation to a customs investigation involving entry, search and seizure, 'in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law, . . . appear too lax and full of loopholes for the interferences in the applicant's rights to have been strictly proportionate to the legitimate aim pursued'.[116]

Not all human rights treaties have as high a standard of protection to extend to taxpayers. Cases heard by the Inter-American Commission on

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110 D. Gomien, D. Harris and L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Strasbourg, Council of Europe Publishing, 1996), pp. 265-268.

111 The same approach is taken in interpreting constitutional rights of a similar kind. For example, J. Li, above n. 78, writes in respect of the Canadian Charter of Rights and Freedoms, that 'no taxpayer has succeeded in convincing a court that the payment of tax is a violation of the right to freedom of conscience and religion'.

112 European Court Human Rights judgment of *Hentrich v. France*, 13616/88 [1994] ECHR 29 (22 September 1994), Series A No. 296-A.

113 European Court Human Rights judgment of *Funke v. France*, 10828/84 [1993] ECHR 7 (25 February 1993), Series A No. 256-A.

114 *Société Stenuit v. France, European Commission of Human Rights*, Application No. 11598/85, Report of 30 May 1991, 14 EHRR 509. The applicant was a company limited by shares and no objection was raised.

115 Above n. 113, para. 56.

116 Ibid., para. 57.

Human Rights tend to focus on protecting the basic procedural rights taken for granted in most Western European democracies.[117] Nonetheless, for tax systems in the most sophisticated democracies, the ECHR offers some salutary lessons. The finding against the government in *Funke* would apply equally in Australia. There is no requirement for a warrant in the Australian Taxation Office's powers of search and seizure, nor is there provision for a taxpayer to claim the right to silence and the privilege against self-incrimination, whereas both are available in criminal investigations.[118]

Taxpayers' rights are generally specifically excluded from human rights agreements. Yet, it is in the different forms of supranational protection that taxpayers will see an unexpected, albeit limited, increase in their primary legal rights by implication and association. On the other hand, in some areas, their traditional rights will be intentionally eroded.

Trading blocs and other international interest groupings are creating a proliferation of multilateral and bilateral treaties. Treaties of cooperation usually include statements of principles that are intended to apply in some form to the citizens of signatories. Where OECD countries are involved there is significant pressure from their own and other OECD citizens and representative groups to include references to human rights. Although, whether or not human rights are mentioned, as we have seen in Europe, economic cooperation normally includes some consideration of such concepts as freedom of movement of goods and non-discrimination. As soon as such concepts become part of the general jurisprudence of a country, whether or not they are translated into the domestic legislation, they can start to influence the courts to provide more substantial primary legal rights.

3. Legislative protection

Primary legal rights are most commonly afforded protection through ordinary legislation. In most jurisdictions there is nothing to distinguish primary from secondary legal rights. This has meant that less attention has been paid to protecting the fundamental rights of taxpayers than has perhaps been warranted. In many jurisdictions the right to impose tax and

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117 R.S. Davidson, *The Inter-American Human Rights System* (Aldershot, Dartmouth, 1997).

118 D. Bentley, 'The Commissioner's Powers: Democracy Fraying at the Edges?' (1994) 4 *Revenue Law Journal*, 85, 101.

the requirement that it should be imposed by law are given constitutional protection. However, the power of administration of the tax system is generally set out as part of the ordinary tax legislation. The framework for exercise of discretion in tax administration is less likely to be stated explicitly. Yet, all three exercises of power form part of the larger power to tax.

This is explored further in Chapter 6. However, it will be seen that without constitutional or supranational restrictions, few of the primarily legal rights are available to taxpayers in many jurisdictions. They are well recognized and many flow directly from the principles set out in Chapter 3. However, just as legal systems do not necessarily protect the human rights that they recognize as principles that should underpin a legal system, neither do they specifically protect primary legal rights that flow from tax principles recognized as features of a good tax system.[119]

The advantage of classification is to identify clearly which are the primary legal rights and where they are protected, if at all. Policy makers and legislators can then specifically decide whether they need additional protection in the tax law. At least then their exclusion is intentional rather than by oversight. As discussed in Chapter 3, it does not make sense to make much of the basic principles underlying tax policy only to ignore them when it comes to translating the policy into legislation. The problem for policy-makers is that primary legal rights recognize that taxpayers do have rights. The human rights debate in many countries shows how difficult it is for any legislature to accept that existing protection is insufficient. It often takes a catalyst, such as major reform, the intervention of an external agency such as the IMF, or political outcry of the kind seen in the US when the Taxpayer Bills of Rights were introduced, for primary legal rights to be considered.

B. Enforceable taxpayers' rights: secondary legal rights

Most jurisdictions have secondary legal rights that provide protection for taxpayers in the context of the operation of the law. Such rights are commonly found in the legislation that governs the administration of the revenue assessment, collection, and enforcement processes. They are therefore fairly easily identifiable and distinguishable from primary legal rights.

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[119] This paradox is discussed in J. Doyle and B. Wells, 'How Far Can The Common Law Go Towards Protecting Human Rights?' in P. Alston, above n. 71, pp. 17, 27.

Two main issues arise. First, the breadth of legal protection very much depends upon the legal system and the way it operates. Many countries rely on administrative rules to implement procedures, and any statutory protection is limited. The secondary legal rights do not therefore form a complete framework for protection, which would be found in combination with primary administrative rights. Often they are interchangeable in form, although they are different in substance. Second, even where there is fairly broad statutory protection, it is usually embodied within the legislation in the context of a specific procedure or rule: there is usually no systematic and comprehensive treatment of taxpayers' rights. Nonetheless, the existence of secondary legal rights is often used as an argument against providing greater statutory protection to taxpayers when an administrative charter or bill of rights is introduced.[120]

Particularly in the common law countries, administrative regulations, proclamations, orders, and rulings have become commonplace, particularly in the area of taxation. Statutory protection is designed to ensure that decisions and procedures are fair and equitable. For example, in Australia, the Administrative Decisions (Judicial Review) Act 1977 (Cth) was introduced 'to simplify and clarify the grounds for judicial review, thereby facilitating access to the courts and enabling the individual to challenge administrative action which adversely affected his interests'.[121]

Administrative decision-making has certain features that can prejudice the interests of the individual. Sir Anthony Mason identified five in particular: it lacks independence and is susceptible to political, ministerial and bureaucratic influence; decisions are not usually made in public; the administrator usually does not have to give reasons for a decision; the administrator does not always observe the standards of natural justice or procedural fairness; and the claims of justice of the individual are often subordinated to the more general demands of public policy.[122]

It is for these reasons that many jurisdictions allow legal rights of review of administrative decisions. In most jurisdictions they extend to a review of decisions made by revenue authorities. Australia introduced an Administrative Appeals Tribunal to review administrative decisions, and a large part of its

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120 As in Japan. *See* K Ishimura, 'The State of Taxpayers' Rights in Japan' in D. Bentley, above n. 46. This was also the position taken by the Australian Government when it decided to introduce an administrative charter of taxpayer rights.

121 Sir A. Mason, 'Administrative Review: The Experience of the First Twelve Years' (1988-1989) 18 *Florida Law Review*, 122, 123.

122 Ibid., p. 30.

case load is concerned with taxation matters. Similar rights of review are available in most OECD jurisdictions.[123] These rights of review are a particularly important example of a secondary legal right.

In its 1990 survey of taxpayers' rights and obligations, the OECD identified six basic principles that apply to the protection of taxpayers and these have been retained in the 2003 guideline on Taxpayer Rights and Obligations.[124] The rights to pay no more than the correct amount of tax and to certainty are primary legal rights. So, too, is the right to publication of the tax rules, but it is phrased as the lower level primary administrative right to be informed, assisted and heard, which is a subset of the primary legal right.[125] The remaining three are secondary legal rights: the right of appeal; the right to privacy; and the right to confidentiality and secrecy.[126]

Secondary legal rights of this kind cannot normally be implemented using administrative measures. They involve the structure of the legal system and legal enforcement mechanisms. However, common law countries often favour administrative measures where these are possible and primary administrative rights form the larger part of taxpayers' rights.

In contrast, some civil law countries have developed a more complete system of secondary legal rights with detailed statutory regulation of the revenue administration process. This imposes limits on the actions of revenue administrators, and affords a greater degree of certainty to taxpayers.

For example, the German Fiscal Code (Abgabenordnung) provides extensive rights to taxpayers who are subject to field audits.[127] Some of these rights are not commonly found in statutes, and include: a taxpayer is entitled to be informed during an audit of any facts that are discovered and their tax consequences; an audit must take place during normal office hours; the taxpayer or her or his representative is entitled to be present during an audit; the taxpayer has a right to a final audit meeting; during a final audit meeting the taxpayer is entitled to discuss disputed facts, their legal consequences and the result of the audit and its legal consequences; and the taxpayer is entitled to a written audit report prior to the raising of an assessment based upon the report.

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123 OECD, above n. 60, p. 12.

124 Ibid. OECD Centre for Tax Policy and Administration, *General Administrative Principles — GAP002 Taxpayer Rights and Obligations* (Paris, OECD, 2003) ('GAP002').

125 *See* Chapters 8 and 9.

126 OECD, GAP002, above n. 124, pp. 4-5.

127 For a detailed discussion, *see* C. Daiber, above n. 63.

There are often cultural and historical reasons for countries taking one approach rather than another. Japan and Singapore prefer administrative discretion in administering the tax system, not simply because their tax systems were based on common law models, but for cultural reasons too.[128] That could be a reason why Hungary has followed the more detailed German approach, although the Hungarian Taxation Order Act is not as comprehensive and systematic.[129]

Historically, the US Internal Revenue Code sets out a statement of the law, while the provisions governing its application are detailed in extensive regulations. In 1988 Congress passed the Taxpayer Bill of Rights.[130] Its name suggests that it constitutes a systematic statutory treatment of taxpayer rights within the Internal Revenue Code. This is far from the case, and it has been suggested that this and the subsequent Taxpayer Bills of Rights 2 (of 1996) and 3 (of 1997) are misnamed. They were merely part of an omnibus law, and 'provided a variety of procedural changes to the Internal Revenue Code without any coherent scheme'.[131]

Nonetheless, the US approach is different to the approach taken in most other jurisdictions, as there has been a considered approach to the question of statutory protection of taxpayers' rights. Elsewhere, the statutory protection has developed with the revenue law and, where there has been a systematic review of taxpayers' rights, it has taken place at the administrative level. The US Taxpayer Bills of Rights may have been introduced into the Internal Revenue Code in a piecemeal fashion, but the aim was to identify specifically, potential abuses of power by the US Internal Revenue Service, and to provide taxpayers with the necessary legislative protection.

Many of the provisions included in the three Taxpayer Bills of Rights are similar to those found in the German Fiscal Code, which give taxpayers certainty in the process of tax administration. For example: assessment notices

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128 *See* K. Ishimura, above n. 120 and V. Beyer, 'Tax Administration in Japan' (1994) 4 *Revenue Law Journal*, 144.

129 *See* D. Deak, 'Taxpayer Rights and Obligations: The Hungarian Experience' in D. Bentley, above n. 46.

130 Technical and Miscellaneous Revenue Act of 1988 PL 100-647 Subtitle J.

131 A. Greenbaum, above n. 46. For further discussion of the Taxpayer Bills of Rights, *see* L.B. Gibbs, 'Taxpayer Bill of Rights', College of William and Mary 35th Annual Tax Conference (Williamsburg, 8-9 December 1989); C.R. Meland, 'Omnibus Taxpayers' Bill of Rights Act: Taxpayers' Remedy or Political Placebo?' (1988) 86 *Michigan Law Review*, 1787; P. Nodoushani and A.S. Locke, 'Taxpayer Bill of Rights 2' [1996] *Taxes* 535.

must be accompanied by explanatory information and reasons for the assessment; the process of the conduct of an audit and, in particular, audit interviews is codified; and there are procedural safeguards that form part of the general collection process and, specifically, with respect to the fairly draconian search and seizure rules.

Other aspects of the Bills of Rights go further, and aim to ameliorate the often harsh effects of the operation of the US revenue law. A criticism of the process of making regulations was that there was insufficient consultation to determine the effect that the introduction of a regulation would have, particularly on small business. Now, any proposed regulation must be commented on for its effect by the Administrator of the Small Business Administration. There was a concern that the remedies available to taxpayers were too limited where Internal Revenue Service employees were inspecting or browsing taxpayers' returns and information. Criminal penalties have been introduced to prevent unauthorized inspections of tax returns and civil remedies provided for taxpayers whose information has been unlawfully disclosed. As in many jurisdictions, taxpayers argued that regulations made under the Internal Revenue Code were increasingly applied retrospectively. Now this is unlawful, except in specified circumstances.

The types of taxpayer protection discussed in the last paragraph cannot be provided through administrative guidelines. They should be distinguished from the procedural rights, such as those governing the conduct of an audit or the information provided with an assessment, which can. There are then two main types of secondary legal right available to taxpayers: first, those that can equally be provided through some form of administrative regulation or guideline; and second, those that can only be given in legislative form.

Revenue administrators and governments prefer the flexibility and authority of administrative guidelines. Nonetheless, statutory protection for taxpayers in procedural matters is available, to some degree, in all OECD jurisdictions. It is the extent of that protection in Germany and Hungary, for example, which contrasts with that given in most common law countries. Usually, the difference in effect on taxpayers is probably small, but legislative protection, by its nature, offers more certainty. On the other hand, whereas legislative concessions are often interpreted strictly, administrative guidelines can expand readily to meet new situations, as revenue authorities always retain the option of later narrowing or removing, fairly easily, any concessions that they give.[132] It is likely, given the trend towards government through

[132] Discussed further in D. Bentley, above n. 17, p. 107.

delegation, that administrative rule-making will increase at the expense of legislative rule-making.

A distinct and separate secondary legal right that supports this approach is the right to request the intervention of an ombudsman in tax matters. Provided there is adequate access to the ombudsman, particularly where statutory rights are limited, it is a major step forward in rights protection. A secondary legal right instituting an ombudsman or similar office supports the implementation of administrative rights. An ombudsman can provide the authority to ensure that revenue administrators give effect to their own administrative guidelines. The office represents the intervention of an independent and impartial third party, where access to the courts is limited.

Australia has successfully introduced a Special Tax Adviser in the Office of the Commonwealth Ombudsman.[133] The United Kingdom uses a Revenue Adjudicator.[134] The Swedish *justitieombudsmannen*, which played an important role in monitoring the committees of locally-elected laypeople that were responsible for assessing Swedish income tax until 1991, issues guidelines that are used in administrative practice.[135] The US used a Taxpayer Ombudsman for some years, but in Taxpayer Bill of Rights 2 the office was replaced by a Taxpayer Advocate. The Taxpayer Advocate reports directly to the Commissioner of the Internal Revenue Service but must make two reports to the House of Representatives Ways and Means and the Senate Finance Committees each year that are not subject to prior review by any official of the Internal Revenue Service or the Treasury.[136] The first report sets out the objectives of the office for the year ahead and the second report identifies the major problems from the past year, with recommendations for their resolution.[137] In addition, the Taxpayer Advocate has significant powers to assist taxpayers.[138] Austria, Denmark, and France have also used an ombudsman successfully.[139]

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133 *See* Commonwealth Ombudsman, *Annual Report 2005-2006* (Canberra, Commonwealth of Australia, 2006), p. 61 *et seq.*, <www.comb.gov.au>, 1 November 2006.

134 Discussed on formation of the office in D. Oliver, 'The Revenue Adjudicator: A New Breed of Ombudsperson?' [1993] *Public Law*, 407. *See* The Adjudicator's Office, *Annual Report 2006* (London, Adjudicator's Office, 2006), <www.adjudicatorsoffice.gov.uk>, 1 November 2006.

135 A. Hultqvist, above n. 72.

136 IRC § 7803(c)(2)(B).

137 Published on <www.irs.gov/advocate>, 1 November 2006.

138 *See* National Taxpayer Advocate's 2007 Objectives Report to Congress, ibid.

139 OECD, above n. 60, p. 20.

Politically, it is beneficial for governments to appoint an ombudsman responsible for assisting taxpayers. It is also a secondary legal right that provides significant additional protection for taxpayers and acts as a balance in the trend towards administrative rights. Publicity and transparency are particularly strong weapons against administrative injustice.[140] This is particularly significant now that revenue authorities are focusing on the importance of taxpayer goodwill in improving compliance.

C. Enforceable taxpayers' rights: primary administrative rights

Primary administrative rights are often interchangeable with secondary legal rights, in that they could be legislated. As discussed above, governments prefer administrative rights to statutory rights for a number of reasons. Administrative rights are flexible. A concession may be given, but it can as easily be taken away. For example, in Australia, there is a legal right to legal professional privilege covering communications or documents in relation to litigation, or to legal advice from lawyers to their clients.[141] The Commissioner of Taxation has chosen to extend this right to a wider selection of documents than would be possible at common law, and to a wider group of persons, including accountants. However, in a number of speeches in the past, the then Commissioner of Taxation expressed concern that this concession was being abused, and indicated the possibility that the ATO may withdraw it.[142]

The example also illustrates the capacity for an administrative right to be extended beyond that available at law. Provided there is a capacity to withdraw a concession in case of necessity, revenue administrators are often willing to broaden the rights they offer to taxpayers in order to improve their ongoing relationship.

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140 D. Bentley, above n. 46.

141 *Grant v. Downs*, (1976) 135 CLR 674 and *Baker v. Campbell*, (1983) 153 CLR 52. A similar concession is available in the Netherlands, but there, priests, notaries, lawyers, doctors and pharmacists are all given privilege, *see* the General Act on Taxation of 1959, art. 53a. R. Fisher, 'Confidential Tax Communication: A Right or a Privilege?' (2005) *Australian Tax Forum*, 555, compares the administrative approach taken in Australia with the statutory extension of the privilege in New Zealand.

142 *See*, *e.g.*, 'ATO Directions and Operations', an address by M. Carmody, the Commissioner of Taxation, to the 1996 Taxation Institute of Australia NSW Convention (Canberra, 21 March 1996).

Administrative rights can assist revenue administrators in improving taxpayer goodwill, which has the flow-on effect of increasing compliance. This has often been at least part of the reason for the introduction of an administrative advance rulings system.[143]

The flexibility of administrative rights is particularly beneficial in tax matters, where changes are so frequent. Revenue administrators can change rights easily to suit the current demands of the substantive law. They can also be more flexible in applying the rights and concessions. For example, they may wish to create exceptions when applying a concession, depending upon the circumstances of a particular case, perhaps where they feel that the taxpayer is taking unfair advantage of it, or where it would not be in the best interests of the community to allow the concession.

Administrative rights can be a precursor to adoption as legal rights. For example, where advance rulings are given on an administrative basis. Over time they become an integral part of revenue administration. The logical progression is that they are then given some form of legislative recognition. This has happened in Australia, the Netherlands and India. In Canada, on the other hand, Revenue Canada considers itself bound by the advance rulings that it provides, but there is no legal requirement for it to do so.[144]

The Netherlands provides an interesting example of administrative rights that are, nonetheless, given legal recognition. This occurs through the application by the courts of the principle of legitimate expectation. It makes certain information that is given to taxpayers by the revenue authority binding on that authority. For example, the revenue authority provides an explanatory brochure with tax returns. The explanatory brochure is binding on the authority if the taxpayer relies on an incorrect explanation, where it is not readily apparent that there is a conflict with the existing law.[145]

In Japan, on the other hand, there are a number of administrative processes that have little or no source in the law. Ishimura cites the example of extended audits. He suggests that, although there is no real provision for them in the legislation, they are reported to have been used even as a form of harassment. This is made easier under the administrative rules governing audits, which do not regulate search and seizure during audits. Ishimura states that 'it is not

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143 In Australia, *see* the Second Reading Speech to the Taxation Laws Amendment (Self Assessment) Bill 1992.

144 *See* J. Li, above n. 78, and D. Sandler, 'Canada', in D. Sandler and E. Fuks (eds.), *The International Guide to Advance Rulings* (Amsterdam, IBFD, 1997-2003).

145 Decision of the Supreme Court of 9 March 1988, BNB 1988/148. Discussed in R. Sommerhalder, above n. 91.

unknown for audit officers to go through the handbag or desk drawers of the audit subject without obtaining consent, even during voluntary audits'.[146] These examples serve to illustrate the importance of administrative protection where the revenue authorities have significant powers and independence under the law.

D. Principles of good practice: secondary administrative rights

Secondary administrative rights are given in the context of detailed processes that could not be legislated efficiently, and often take the form of guidelines issued by revenue authorities. Many secondary administrative rights are found in administrative charters of taxpayer rights, which, although they contain statutory and primary administrative rights, also make statements that taxpayers have rights that really are not practically enforceable, except in a general sense.

In Canada, the Declaration: Your Rights tells taxpayers that, 'You have the right to get complete, accurate, and clear information about your rights, entitlements, and obligations'.[147] Some of this information can be provided through legislation and explanatory memoranda. However, much of it has to be issued via the website, information brochures, booklets and pamphlets published by Revenue Canada. Taxpayers can place reasonable reliance on such information in ordering their affairs, but in many situations they are relying on the information provided by Revenue Canada, with only the promise of the Declaration of Rights to protect them if they are wrong: the doctrine of legitimate expectation is not as broad in Canada as it is in the Netherlands.[148] The statements made in information brochures that do not flow directly from the law, are usually secondary administrative rights. They could not be legislated, but form the framework of minor rules and procedures for the operation of the system.

Of particular importance to administrative rights is the way that a revenue officer exercises delegated authority to make a decision. When the law delegates decision-making powers, it usually lays down guidelines as to how the decision is to be made, or relies on standard principles of administrative procedure. However, a decision is usually discretionary in nature and depends

146 K. Ishimura, above n. 120.

147 *See* <www.cra-arc.gc.ca/agency/fairness>, 1 November 2006.

148 *See* J. Li, above n. 78.

upon the particular circumstances of the individual taxpayer. That is the reason for the delegation of the decision-making power in the first place.

Normally a revenue authority will publish guidelines as to how it will make decisions and the factors it will take into account in exercising its discretion. Administrative guidelines governing the decision-making process are primary administrative rights as they could be legislated. The decisions flowing from these powers are often secondary administrative rights. Typically these are found in such areas as the application of penalty provisions where there is a late payment of tax. Many jurisdictions have culpability components that are determined at the discretion of a revenue officer. The revenue authority can have a wide discretion in both procedural and substantive matters. For example, in respect of the same taxpayer it might have to determine whether to audit the taxpayer or not, and, if it does, whether to apply an anti-avoidance provision to a scheme or transaction. As the discretion and decision-making powers vested in revenue administrators are broad, so, too, is the importance of the administrative guidelines they publish in relation to the exercise of those powers. In most cases, the only enforcement mechanism that exists for a taxpayer in relation to procedural matters is to take up a breach of revenue authority guidelines with the authority's own internal problem resolution service, where it exists, or with the relevant ombudsman.

That said, practice has shown that internal problem resolution units can be remarkably effective in resolving disputes between line officers of a revenue authority and taxpayers.[149] As discussed above, an ombudsman can also resolve disputes, even where the office has no direct authority to enforce a resolution, simply because of the publicity and reporting capabilities that usually attach to the office.

Some jurisdictions do not provide this kind of protection to support secondary administrative rights. For example, in Japan legislative provisions are stated in broad terms and leave considerable discretion to the tax authorities. The tax authorities usually do provide guidance as to how they will exercise their discretion, but there is little recourse for taxpayers if they disagree with that exercise.[150] Ishimura states that, 'it is not possible for taxpayers or tax specialists to interpret or apply tax laws or to check the validity of specific treatment by the tax authorities, without consulting tax circulars. In other words, circulars do virtually have the force of law, and do have de facto binding effect on the taxpayer'.[151]

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149 D. Bentley, above n. 46.

150 K. Ishimura, above n. 120.

151 Ibid.

A slightly different form of this approach to revenue administration is sometimes used. Where the law in a jurisdiction is out of date and it would be impossible, ludicrous or unfair to apply it in a particular way, revenue authorities will issue rulings or extra-statutory concessions. These state that they will not apply the law as it stands and that taxpayers should not follow it. In this way the revenue authority maintains both the goodwill of taxpayers, and a respect for the law as it is applied.

Secondary administrative rights are elusive. Primary administrative rights are recognisable as they provide the formal administrative rules and procedures for the operation of the tax system and could normally be legislated as secondary legal rights. Secondary administrative rights form that vast body of quasi-rules and processes on which taxpayers rely on a daily basis for the efficient and effective operation of the system. In a Model these rights are articulated in the form of general principles of good tax administration. Their importance is recognized in taxpayers' charters and the OECD general administrative principles.[152] The aim is to identify clearly that secondary administrative rights are important to the proper functioning of a model modern tax administration.[153]

E. Principles of good practice: administrative goals

Administrative goals are often also included in charters and similar administrative statements of taxpayer rights. They are concerned largely with the attitudes of revenue authority staff and the manner of their relationship with taxpayers. For example, Revenue Canada's Fairness and Client Rights document states, inter alia, that 'you have the right to be treated with courtesy, respect and consideration'. The Australian Taxpayers' Charter states that, 'You can expect us to offer you professional service and assistance to help you to understand and meet your tax obligations'. New Zealand taxpayers are entitled to 'prompt, courteous and professional' service under the Inland Revenue charter.

Administrative goals are essentially an attempt to set a code of conduct. They should be seen in the context of the move by revenue authorities towards engendering taxpayer goodwill. It is not surprising that revenue authorities most interested in improving taxpayer compliance through good relationships

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152 OECD, GAP002, above n. 124.

153 With apologies to Gilbert and Sullivan.

with taxpayers provide administrative goals. They have flexible content and depend largely upon contextual interpretation of social rules. Nonetheless, they are important in that they do represent the trend towards a service oriented approach within a revenue administration that espouses them. As the OECD survey of taxpayers' rights in 1990 stated, 'An efficient tax administration also requires that taxpayers are treated in a courteous and efficient manner and that the possibility of dialogue between the administration and the taxpayer is provided'.[154]

When charters of rights were first introduced taxpayers were justifiably sceptical of the importance of administrative goals.[155] However, the development of modern management processes within tax administrations has seen a strong emphasis on statements of service standards accompanied by performance measurement.[156] A review of revenue authorities in the 2006 OECD Comparative Information Series Report on tax administration shows that most annual plans and reports are now both linked to achievement of specific performance standards and guided by formal taxpayers' rights in law or official documents.[157] They form part of the OECD Principles of Good Tax Administration.[158] It is therefore appropriate to consider administrative goals as an important part of the broader administrative framework for taxpayers' rights.

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154 OECD, above n. 60, p. 14.

155 For example, D. Williams, 'The Taxpayers' Charter: A View From The Profession', paper presented at the ATAX conference on Current Issues in Tax Administration (11-12 April 1996); A Carey, 'Taxpayers' Charter' (1995-1996) 30 *Taxation in Australia*, 543; and Taxation Institute of Australia, 'Current Topic' (1995-1996) 30 *Taxation in Australia*, 230.

156 *See*, OECD Committee of Fiscal Affairs Forum on Strategic Management, *Performance Management in Tax Administrations* (Paris, Centre for Tax Policy and Administration, 2001) and as an example, OECD Committee of Fiscal Affairs Forum on Tax Administration, *Survey of Trends in Taxpayer Service Delivery Using New Technologies* (Paris, Centre for Tax Policy and Administration, 2005). Explored in S. James, T. Svetalekth and B. Wright, 'The Benefits of a More Strategic Approach to Tax Administration and the Role of Performance Indicators', paper presented at the 7th International Tax Administration Conference 2006 (Sydney, Australia).

157 OECD, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2006)* (Paris, Centre for Tax Policy and Administration, 2006) ('2006 OECD Comparative Survey') p. 39 *et seq.*

158 OECD Centre for Tax Policy and Administration *GAP001 Principles of Good Tax Administration — Practice Note* (Paris, Centre for Tax Policy and Administration, 2001).

Take both Australia and the US as illustrations.[159] The ATO regularly commissions external reports on how well it is achieving its administrative goals and published charter standards. The 2005 review identified that, for example, taxpayers saw the way ATO staff treated them as particular strengths of the revenue authority.[160] This is a particularly pleasing result for the ATO as it has developed a compliance model that assumes taxpayers are honest and has worked assiduously to mould its culture to reflect this.[161] The 2007 National Taxpayer Advocate Objectives reflect a similar focus in the IRS. For example, the Taxpayer Advocate is undertaking several research studies that 'should help the IRS craft an approach to taxpayer service that meets taxpayers' individual needs' as part of the IRS Taxpayer Assistance Blueprint.[162] Where performance is being judged publicly and transparently on achievement of administrative goals, it makes them valuable instruments in the development and protection of a broader framework of taxpayers' rights.

For the Model, as with secondary administrative rights, the classification recognizes that administrative goals form part of the general principles of good administrative practice. They are not generally within the scope of an ombudsman's review. However, because they form part of the reporting and evaluation process for the revenue authority there is strong incentive for revenue officers to meet the articulated standards. It is therefore legitimate to suggest that administrative goals do form part of the Model as they can ensure improved taxpayer treatment.[163]

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159 TNS Consultants, *Review of the Taxpayers' Charter 2005* (TNS Social Research, 2006), <www.ato.gov.au>, 1 August 2006. *National Taxpayer Advocate's 2007 Objectives Report to Congress*, 30 June 2006, <www.irs.gov/advocate/>, 1 August 2006.

160 TNS, Ibid., p. 6.

161 S. James, K. Murphy and M. Reinhart, 'The Citizen's Charter: How Such Initiatives Might Be More Effective' (2005) 20 *Public Policy and Administration*, 1, 13; V. Braithwaite and J. Braithwaite, 'An Evolving Compliance Model for Tax Enforcement' in N. Shover and J.P. Wright (eds.), *Crimes of Privilege* (Oxford, OUP, 2000), ch. 6; and K. Murphy, 'Moving Towards a More Effective Model of regulatory Enforcement in the Australian Taxation Office' [2004] *British Tax Review*, 603.

162 National Taxpayer Advocate's 2007 Objectives Report to Congress, above n. 138, p. vii.

163 S. James, T. Svetalekth and B. Wright, above n. 156.

VI. Conclusion

Chapter 2 explored the reasons why a Model of taxpayers' rights is timely and beneficial in the context of developments in tax administration and the broader legal framework in the latter part of the 20th and early part of the 21st centuries. However, it is difficult to identify exactly which rights should be included. The traditional principles that underpin tax policy are well known, but Chapter 3 showed how their content and meaning was less well defined. It put forward a simplified and generally acceptable common meaning for those principles that are regarded as forming the basis for tax systems. They should also therefore influence taxpayers' rights.

Although an agreed set of principles is an important starting point for common agreement, Chapter 3 also outlined the difficulties that flow from the interpretation of any international model set of rules or guidelines. There may be significant differences in interpretation and therefore application of rules. It will depend on a range of factors, from variations in the legal system through to cultural mores that dictate how a rule or process should be implemented. Chapter 3 stressed that the rights contained in the Model will contain common content, but must be flexible enough to cope with variations in approach to their implementation. Rules should not be implemented unless it is within the context of the legal system, culture, economy and broader environment of a jurisdiction. A Model that is not expressed broadly enough to facilitate contextual implementation is of little use.

This chapter has explored the different types of right that could be included in a model and how best to classify them. The classification takes place in an environment, where the way government works is changing, in part because of its scope. In the context of expanding government, there is, paradoxically, increasing taxpayer protection and a need for standards and guidelines to assist in the exercise of power. Where once it may have been thought that the only substantive protection available to citizens was through legislation, because administrative protection was fairly limited, this is no longer the case. It is therefore important to classify taxpayers' rights in a way that reflects their different content. The differences are often found in the means of enforcement and these are explored further in Chapter 5.

This Chapter has shown how important it is to recognize the differences between each type of right. Their nature will produce a radically different result. Any jurisdiction should identify the rights it affords taxpayers across the tax system. It is no longer sufficient, if policymakers are serious about providing a comprehensive framework for taxation, to leave it to the protection

given elsewhere in the law without determining whether or not it is appropriate. A comprehensive approach requires review of both legal and administrative rights, recognising the widely different impact depending upon which method of enforcement is used.

The nuances in the classification of rights become particularly significant as countries seek to implement greater taxpayer protection as part of the reform of their tax systems. By understanding the different classes of right they will be able to identify much more easily the appropriate framework of rights for their particular tax administration. This will cater to the operation of the rules in the system, the effect of those rules, and the gaps in those rules. The rules and principles within the classification system are found in Chapters 6 to 8. Chapter 6 focuses on the primary legal rules that provide the legislative framework governing the taxation system. Chapter 7 explores the general principles of good tax administration, secondary legal rights and administrative goals — those elements related to how the tax administration exercises its powers. Chapter 8 analyses the secondary legal rights and primary administrative rights that form much of the substance of taxpayers' rights in any tax system. The rights then translate into the Model in Chapter 9.

CHAPTER FIVE

Enforcement of Rights

I. Introduction

The aim of a Model of taxpayers' rights is to provide a guide to best practice in tax administration. As noted in earlier chapters, the implementation depends heavily on the legal, social, cultural and economic context of the particular jurisdiction. Therefore the Model cannot itself articulate the precise means of enforcement of the rights it includes. It can provide a guide to how each of the different types of rights should be enforced to give them effect. This is essential to understand the meaning of the rights set out in Chapters 6 to 8.

Chapter 4 identified the context and classification of taxpayers' rights. Enforcement relates directly to classification as legal or administrative rights. The issue becomes more complex for legislative enforcement simply because the subject of the legislation is rights protection. At the administrative level, the potential mechanisms available and methods used to enforce rights are not as distinctive.

The first part of this chapter examines the levels of legal enforcement available and identifies their advantages and disadvantages using examples from a range of jurisdictions. Some primary legal rights dealing with taxation are part of the basis of the legal system. It is therefore appropriate to begin an analysis with a review of constitutional enforcement. However, much of the discussion about enforcement of legal rights focuses on ordinary legislation and how best to protect rights it contains. Therefore, the main focus of the discussion on legal enforcement is on mechanisms such as protection of rights through interpretation provisions and pre-legislative scrutiny.

The second part of the chapter focuses on administrative mechanisms and enforcement, particularly in the context of developments in alternative dispute

resolution (ADR) theory. This part uses the example of the ATO dispute resolution model to illustrate the effective design of a dispute resolution model in the context of tax administration.

Both parts provide recommendations on the most appropriate forms and processes for enforcement of taxpayers' rights. These are included in the Model in Chapter 9.

II. Legislative enforcement

A. Level of enforcement

The classification of taxpayers' rights in Chapter 4 identified primary and secondary legal rights. Unlike the enforcement of a specific bill of rights, such as those in Canada, the United Kingdom, South Africa and New Zealand, taxpayers' rights are usually embodied in a number of different laws. This is similar to the protection of general rights in countries such as the United States and Australia, where some rights are given constitutional protection, but others are included in a range of different laws.

There are numerous models and different levels of enforcement of rights legislation.[1] How they are treated depends upon what kind of law embodies the rights in the legal hierarchy and what powers are allocated to judges or other bodies or groups in respect of that kind of law.[2] This Part examines in the following order, those models representative, in general terms, of each level of enforcement and analyses their appropriateness in the context of taxpayers' rights:

– Constitutional enforcement
– Legislative entrenchment

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1 For a review of the most common models, *see* P. Alston (ed.), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford, OUP, 1999), with a general comparative overview in M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective' in p. 465, p. 469. *See further*, G. Griffith, *The Protection of Human Rights: A Review of Selected Jurisdictions* (Briefing Paper No. 3/2000 NSW Parliamentary Library Research Service).

2 *See further*, J.L. Black-Branch, 'Parliamentary Supremacy of Political Expediency?: The Constitutional Position of the Human Rights Act under British Law' (2002) 23(1) *Statute Law Review*, 59, 60 in the context of the constitutional position of human rights.

– Use of an interpretation clause
– Pre-legislative scrutiny
– Ordinary legislation

1. Constitutional provisions

Most countries now have written constitutions. In addition to setting out the structure and operation of government, many constitutions incorporate protection of the rights of citizens. Some of these rights can impact directly on taxpayers, such as a right to a fair trial in the context of a tax offence and the right of appeal from a decision of a tax court. Constitutional bills of rights have become more common, with the growing emphasis worldwide on human rights. However, Bills of Rights are more usually introduced using other statutory methods, discussed further below.

Constitutional protection of human rights should provide the strongest assurance to citizens that their rights will indeed be protected. For after all, in the words of De Smith, the constitution comprises 'the law behind the law — the legal source of legitimate authority'.[3] Whether this is because of an intrinsic rule of recognition,[4] because of its pedigree,[5] or other theoretical foundation, the constitution is viewed as a higher form of law, 'hierarchically superior to other laws'.[6]

As a higher law, the constitution is not normally alterable except by special procedures. These can be flexible, as in many parliamentary democracies, where amendment is simply by special majority of the legislature. This is consistent with Dicey's traditional concept of parliamentary sovereignty that 'a sovereign power cannot, whilst retaining its sovereign character, restrict its own powers by any particular enactment'.[7] The special procedures can be more

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3 S.A. de Smith, *Constitutional and Administrative Law* (3rd edn., Harmondsworth, Penguin, 1971), p. 18.

4 As posited by H.L.A. Hart, in *The Concept of Law* (2nd edn., Oxford, Clarendon Press, 1994).

5 Dworkin's theory as to the recognition of the source of law. *See* R. Dworkin, *Taking Rights Seriously* (London, Duckworth, 1978).

6 S.A. De Smith, above n. 3, p. 18.

7 A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn., London, Butterworths, 1960), p. 68, n. 1, discussed in A. Chander, 'Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights' (1991) 101 *Yale Law Journal*, 457, 463 in an analysis of orthodox and new views of parliamentary sovereignty.

rigid, as in Australia, where the Commonwealth Constitution can be amended only by an absolute majority of Parliament, with the approval of a majority of electors both overall and in a majority of States.[8] They can be immutable as in the German Constitution, 'which declares that certain fundamental principles are immune to constitutional amendment'.[9] Manner and form legislation is dealt with more fully below.

The German constitution has been used to protect a number of taxpayers' rights over the years. This ranged from the application of the principle of the separation of powers to disallow the tax authorities from levying administrative penalties other than those for late payment, to finding that interest taxation was unconstitutional as the level of enforcement was not appropriate.[10] However, most constitutions do not provide this level of protection for taxpayers.

In the context of human rights generally, Darrow and Alston argue that, 'it is becoming increasingly difficult for a state to demonstrate that it has taken all appropriate measures in the absence of some kind of recognition of human rights standards.'[11] This would normally occur either through the introduction of a bill of rights or by measures that ensure that international human rights obligations prevail over domestic law.[12] Some of the primary taxpayers' rights may be covered appropriately by existing constitutional protection for rights generally. However, the content applicable to taxpayer protection may need more explicit articulation. For example, a constitutional protection of a citizen's right to equality may still allow a restrictive interpretation in relation to tax. Canada provides an illustration.

Taxpayers have sought to apply to taxation the Section 15 equality rights of the Canadian Charter of Rights and Freedoms (the Canadian Charter), which forms part of the Canadian Constitution.[13] The Supreme Court has stated clearly that the Canadian Charter applies to the Canadian Income Tax Act

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8 Section 128 of the Constitution.

9 A. Chander, above n. 7, p. 462, who discusses the concept of immutability and points out that constitutions, however entrenched, are of course vulnerable to revolution.

10 A.J. Rädler, 'General Description: Germany' in H.J. Ault, *Comparative Income Taxation: A Structural Analysis* (The Hague, Kluwer Law International, 1997), p. 49, pp. 61-62.

11 M. Darrow and P. Alston, above n. 1, p. 469.

12 Ibid.

13 Constitution Act 1982, Part 1, being the Canada Act 1982 (UK), Schedule B, c 11.

as much as to other legislation.[14] However, in *Thibadeau v. Canada*, Gonthier J noted the special nature of the Income Tax Act as a significant factor to be taken into account in defining the scope of the equality rights and that the essence of the Act is 'to make distinctions, so as to generate revenue for the government while equitably reconciling a range of necessarily divergent interests'.[15] This approach has been strongly criticised by some commentators. Philipps argues that it is problematic, as 'it threatens to keep hidden from view those assumptions and concepts within the tax system which may reinforce larger patterns of social and economic inequality',[16] thereby giving rise to toleration of a lesser standard of fair treatment in tax law.[17]

Whatever the merits of the decision, it illustrates that the application of general rights to tax law is often interpreted restrictively because of the nature of tax law. Constitutional protection can fundamentally extend the protection of taxpayers. The Canadian Charter has resulted in major changes to the audit and investigative powers of Revenue Canada.[18] However, the point is that it requires the introduction of a charter or bill of rights into a constitution for these effects to be felt in the tax law. Constitutional amendment is almost certainly not going to occur specifically to insert taxpayers' rights.

Therefore, to rely on the introduction of taxpayers' rights contained in a Model into a constitution, even where the constitution of a country already contains some protection of general human rights, is both inappropriate to the substance of taxpayers' rights and the constitution as a potential vehicle for their protection. Taxpayers' rights are protected at best indirectly by constitutions. They are a specific type of right peculiar to one area of the law, where the executive interacts on a daily basis with the individual. It is more appropriate for protection to apply specifically and not to rely on the indirect protection afforded by a broad, over-arching instrument that was not designed as a means to protect taxpayers' rights. Even for primary legal rights, appropriate protection for taxpayers relies on specific legislative attention, or there is a risk that the association with taxation will cause the protection to be read down.

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14 In both *Symes v. The Queen*, [1994] 1CTC 40, 94 DTC 6001 (SCC) and *Thibadeau v. Canada*, [1995] 2 SCR 627, [1995] 1 CTC 212, 95 DTC 5998 (SCC).

15 *Thibadeau v. Canada*, ibid., p. 392 (CTC) and discussed in J. Li, 'Taxpayers' Rights in Canada' in D. Bentley (ed.) *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998), p. 89, p. 129 *et seq.*

16 L. Philipps, 'Tax Law: Equality Rights: *Thibadeau v. Canada*' (1995) 74 *The Canadian Bar Review*, 668.

17 Ibid., p. 675.

18 J. Li, above n. 15, p. 109.

2. Entrenchment

Similar concerns about appropriateness for taxpayers' rights apply to the next level of protection: entrenchment. Proponents of rights protection of course prefer the maximum protection, not subject to the whim, whether advertent or inadvertent, of parliamentary override. The most secure method of enforcement is through entrenchment, whereby the legislature restricts its ability to amend or appeal legislation by ordinary enactment.

In the absence of some form of entrenchment the problem facing the courts, when an apparent breach of rights comes before them, is that parliament is sovereign in most democracies. The issue was well set out by Brennan J in the Australian case of *Nationwide News Pty Ltd v. Wills*[19]

> A court will interpret laws of the Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms but the court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the courts' opinion, should be preserved.

To overcome this problem, it is possible to introduce what is sometimes called a 'manner and form' provision, designed to entrench the legislation embodying rights that the parliament wishes to protect. This was the approach taken, for example, to entrench the Bill of Rights contained in the South African Constitution.[20]

A manner and form provision could theoretically apply to legislation embodying taxpayers' rights.[21] A 'manner' provision generally sets a mechanism for amendment or repeal of a piece of legislation, which goes beyond the usual simple majority requirement. Examples would be the requirement of a greater than simple majority of one or more Houses of Parliament[22] and

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19 (1992) 177 CLR 1, 43.

20 Chapter 2, 1996 Constitution.

21 For a discussion of the application of manner and form provisions, *see e.g.*, A. Chander, above n. 7; J.L. Black-Branch, above n. 2; G. Winterton, 'Can the Commonwealth Parliament Enact ''Manner and Form'' Legislation?' (1980) 11 *Federal Law Review*, 167; and G. Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *QUT Law Journal*, 69.

22 *See e.g.*, the Australian case, *The Bribery Commissioner v. Pedrick Ranasinghe*, [1965] AC 172.

approval by a referendum of electors.[23] The South African constitution requires a two-thirds majority vote of the National Assembly and approval of at least six of the nine provincial legislatures to amend it.[24] A 'form' provision generally prescribes an express form that an amendment or repeal must take. An example would be a requirement that legislation inconsistent with a bill of rights, to be effective, must expressly declare that it should operate notwithstanding the bill of rights.[25] To be effective, a manner and form provision would also generally be entrenched or it could itself be repealed by an ordinary act of parliament.[26]

The advantage of entrenching taxpayers' rights using a manner and form provision is that it overcomes the principle that where a subsequent Act of Parliament conflicts with an earlier Act, the later Act repeals the earlier.[27] It would mean that the taxpayers' rights could not be repealed expressly or by implication by a later Act of Parliament unless that Act complied with the requirements set out in the manner and form provision. In other words, it would require that any change to the legislation embodying the taxpayers' rights 'be directly considered and intended by the drafters of the later Act rather than be merely an unintended consequence of an implied inconsistency.'[28]

However, entrenchment places a significant qualification on parliamentary sovereignty. In some jurisdictions there may not be capacity to entrench legislation in this way,[29] particularly where the application of the legislation is to a very specific area. In most jurisdictions where it is possible, entrenchment is restricted to those elements of the law that have constitutional effect. The option of entrenchment is considered in the context of general bills of rights, not for anything less.[30] As with general constitutional protection,

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23 *See e.g.*, in Australia, s. 128 of the Constitution and the discussion of referenda in this context in A. Chander, above n. 7, particularly pp. 475-480, where recent United Kingdom referenda have been used to provide popular majority support for major constitutional decisions.

24 Section 74(2).

25 *See further*, G. Winterton, above n. 21, p. 171, who gives the Canadian example of The Bill of Rights 1960 (Can) s. 2.

26 Ibid., p. 172 and G. Carney, above n. 21, p. 70.

27 G. Carney, ibid., p. 71.

28 Ibid., p. 72.

29 For a discussion of this point in the context of manner and form, *see* O. Hood Phillips, P. Jackson and P. Leopold, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th edn., London, Sweet and Maxwell, 2001), p. 4-025 *et seq*.

30 M. Darrow and P. Alston, above n. 1, p. 484, explore the debate over entrenched bills of rights, canvassing the advantages and disadvantages.

entrenchment is probably only relevant to taxpayers' rights to the extent that they fall within a general bill of rights. Some of the provisions of a Model could fall within such a bill, but it is beyond the scope of this book to explore the appropriate means for the introduction of a general bill of rights.

3. Protection through interpretation

Particularly in the context of those taxpayers' rights that are capable of legislative enforcement, what then are the options for ensuring their protection? It would be usual where rights from the Model are legislated, for the legislation to form part of an act governing tax administration. Tax administration may fall within the general act or acts governing taxation or be subject to a separate act.[31] The strongest form of protection for those rights protected by ordinary legislation would be separate identification within an act and protection by an interpretation clause. This section builds specifically upon the analysis set out in Chapter 3 on the interpretation of the content of rights.

An interpretation clause is incorporated as part of the enacting legislation and requires subsequent Acts of Parliament affecting the protected content to be interpreted in accordance with that content, rather than to override it or negate its effect by implication. It is important to distinguish at this point between an interpretation clause in its ordinary sense and a clause that is designed to reconcile parliamentary supremacy with entrenchment. In jurisdictions where there is entrenchment, such as Canada, a clause in the entrenched rights legislation permits the legislature to protect other subsequent legislation from being interpreted as being in breach of the rights legislation by specifically including a declaratory provision to override the rights being breached. This ensures that Parliament is not irrevocably bound by the earlier legislation.[32] The use of a declaratory provision might apply in areas often the

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[31] Discussed in R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi (ed.), vol. 1, *Tax Law Design and Drafting* (Washington DC, IMF, 1996 and 1998), p. 95, p. 110.

[32] M. Darrow and P. Alston, above n. 1, p. 498, put forward the argument from democratic theory for an amelioration of entrenchment:

> an entrenched bill of rights places power in the hands of an unelected, unaccountable, unrepresentative and elite group of people (i.e., judges) who are empowered to overturn Acts of Parliament, which reflect the values determined by duly elected representatives of the people, to the extent that any inconsistency with the bill of rights is identified by the judge.

subject of the exercise of margins of appreciation in international human rights documents, such as anti-terrorism legislation.

The Canadian Charter of Rights and Freedoms uses a 'notwithstanding' provision to reconcile constitutional entrenchment with the doctrine of parliamentary sovereignty. Section 33(1) of the Canadian Charter provides that:

> Parliament or the legislature of a province may expressly declare in an Act of parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Although allowing a 'notwithstanding' provision waters down the extent of the entrenchment, it is still a very significant form of protection and more powerful than a simple interpretation clause. The sections that may be overridden are limited,[33] the period of the override is limited to a maximum of five years (although it may then be re-enacted for a further maximum five year period)[34] and the psychological and political implications of invoking the override have tended to act as a barrier to its general use.[35] An interpretation clause offers a less substantial legislative impediment to override of enacted rights.[36]

It is also important to distinguish from an interpretation clause a clause giving courts the power to declare legislation incompatible with the legislation enacting rights. This is the position under the United Kingdom Human Rights Act 1998, where section 4 allows the superior courts to declare that legislation enacted by Parliament is incompatible with a right under the European Convention of Human Rights (rights to which the Act aims to give effect in the

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33 Section 33(1) limits the override to s. 2 or ss 7 to 15.

34 Section 33(3) and (4).

35 For example, *see* the analysis in J.L. Hiebert, 'Why must a Bill of Rights be a contest of political and judicial wills? The Canadian alternative' (1999) 10 *Public Law Review*, 22, 24.

36 An interpretation clause is also found in s. 4(1) of the 1990 Hong Kong Bill of Rights, which states that, 'All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be construed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.' *See further*, A. Byrnes, 'And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights' in M. Darrow and P. Alston, above n. 1, p. 318, p. 356 *et seq*.

United Kingdom).[37] A declaration of incompatibility allows for amendment of the offending provisions by ministerial order under section 10 or for amendment by Parliament.

An interpretation clause is usually included in most acts promulgating rights. Where it is combined with a 'notwithstanding' clause or a declaration of incompatibility it is a more powerful protector of rights. A simple interpretation clause is usually the strongest form of protection that would be used to protect taxpayers' rights as they are generally not fundamental but derivative rights. However, from the discussion below, it will become apparent that an advisory power of incompatibility in the hands of the courts could be useful both to a revenue authority and the legislature.

In the UK Human Rights Act 1998, section 3, the interpretation clause, requires that 'so far as it is possible to do so primary and secondary legislation — whether enacted before or after the 1998 Act — must be read and given effect in a way which is compatible with Convention rights'.[38] In the context of rights legislation, this would usually mean a broad and purposive interpretation as described in Chapter 3.[39]

The New Zealand Bill of Rights Act uses a weaker interpretive construction than the UK Human Rights Act 1998.[40] The New Zealand Bill of Rights Act will not override earlier inconsistent legislation. Section 4 of the New Zealand Bill of Rights Act states that:[41]

> No Court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),

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37 Compare this to New Zealand, where the court was initially of the opinion that it was precluded from giving advisory opinions, *see* P. Cooke, *Temese v. Police*, (1992) 9 CRNZ 425, 427 and K.D. Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) *Modern Law Review*, 79. This issue was resolved in *Moonen v. Film and Literature Board of Review*, [2000] 2 NZLR 9 where it was held that the court could make a judicial declaration of incompatibility where there was a clear statutory inconsistency that could not be resolved through interpretation. Discussed in P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, *The New Zealand Bill of Rights* (Oxford, OUP, 2003), p. 117 *et seq*.

38 O. Hood Phillips, P. Jackson and P. Leopold, above n. 29.

39 Ibid., p. 479.

40 *See also* the Hong Kong Bill of Rights, A. Byrnes, above n. 36, p. 348 and J. Allan, 'A Bill of Rights for Hong Kong' [1991] *Public Law*, 175, 178.

41 For a discussion of these sections, *see further*, P. Rishworth et al., above n. 37, ch. 4 and P.A. Joseph, 'The New Zealand Bill of Rights Experience' in M. Darrow and P. Alston, above n. 1, p. 283, p. 289 *et seq.*

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment — by reason only that the provision is inconsistent with any provision of this Bill of Rights

This section must be read in conjunction with sections 5 and 6 of the New Zealand Bill of Rights Act. Section 5 states that:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 goes on to say:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

These sections require the courts to interpret Acts of Parliament as though they are consistent with the New Zealand Bill of Rights Act. The usual rule of interpretation applicable to contradictory legislation and adopted by common law courts was set out by Lord Blackburn in *Garnett v. Bradley*:[42]

> When the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. . . . But when the new affirmative words . . . by their necessity. . . . import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first.[43]

Section 4 seeks to overcome the application of this rule for laws passed prior to the New Zealand Bill of Rights Act where there is a clear contradiction. A subsequent law clearly contradictory to the New Zealand Bill of Rights Act

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42 *Garnett v. Bradley*, (1878) 3 App Cas 944, 966.

43 The principle of *leges posteriores priores contrarias abrogant* as interpreted by Lord Blackburn, is an accepted element of much common law jurisprudence. *See*, *e.g.*, in Australia, *Butler v. Attorney-General (Vie)*, (1961) 106 CLR 268.

would first be subject to section 6, which emphasises that a consistent meaning is to be preferred over any other meaning. Where a meaning consistent with the New Zealand Bill of Rights Act in its broad form is not possible, then section 5 can be used to assist with the interpretation. As stated by Hardie Boys J in *Ministry of Transport v. Noort*:[44]

> There must be many a statute which can be read consistently with the Bill's rights and freedoms if it is accepted that the statute has imposed some limit or qualification upon them; in other words, that although the statute cannot be given a meaning consistent with the Bill's rights and freedoms in their entirety, it can be given a meaning consistent with them in a limited or abridged form. It is obviously consistent with the spirit and purpose of the Bill of Rights Act that such a meaning should be adopted rather than that s. 4 should apply so that the rights and freedoms are excluded altogether.[45]

The statutory construction builds carefully on the pre-existing principles of interpretation generally accepted in common law jurisdictions. Although the construction is in the context of the New Zealand Bill of Rights Act, there is no reason why a similar approach could not be taken within an individual act, such as a tax act. The interpretation clause would apply to the specific body of rights included in that legislation. It would reinforce and extend the principles of common law interpretation set out in Chapter 3. It would provide a specific direction to the courts, while guarding the principle of parliamentary supremacy. In the context of tax laws it could provide clear direction from the legislature as to the margins of appreciation applicable to tax law, much as section 5 of the New Zealand Bill of Rights Act 'supplies a standard that limits on rights must meet, along with a methodology for applying that standard'.[46]

One of the major stumbling blocks to the introduction of a general interpretation clause is that it requires the courts to compare different acts and prefer the interpretation and application of one over another. Legislatures fear the implications of allowing their enactments to be constrained in this way. Many jurisdictions have legislation that governs the interpretation of

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44 *Ministry of Transport v. Noort*, [1992] 3 NZLR 260, 287. Followed by the High Court in *Herewini v. Ministry of Transport*, (1992) 9 CRNZ 307, 321.

45 For an extensive discussion of this and other cases which have examined ss 4, 5 and 6 of the Bill of Rights, *see* J.B. Elkind, 'On the Limited Applicability of Section 4, Bill of Rights Act' [1993] *New Zealand Law Journal*, 111.

46 Rishworth et al., above n. 37, p. 120.

legislation.[47] That this has not been considered sufficient in the context of bills of rights is evidenced in the analysis above. It may be that the drive for rights legislation is often politically motivated and even with entrenchment or interpretation clauses there is considerable scepticism as to its effectiveness in many jurisdictions.[48]

That said, interpretation acts and clauses are a feature of modern legislation to ensure consistency across complex and interrelated areas of law.[49] Tax laws are no different and it would not be inconsistent with modern approaches to legislative drafting to include an interpretation clause in the legislation governing the administration of the tax laws.

Tax legislation has always provided an interpretive conundrum. Prebble has argued that tax is, in many ways, a gloss on the legal system, or a legal ectopia:[50] it creates a legal fiction in order to apply tax law. For example, whereas company law creates the company as a separate legal entity, tax law often looks through that entity at the ultimate owners, ignoring the operation of the company law in its application.[51] The range of legal fictions created means that there is often overlap and a requirement for the legislation or judges to identify the priority of one clause or statute over another. Anti-avoidance rules are the most common example. The priority of rules governing ordinary income and expenses over capital gains rules can be another. It would therefore not be a significant deviation from the norm to include an interpretation clause into the statute or section of the statute governing tax administration to ensure the priority of those clauses providing taxpayers' rights.

This would be facilitated in most jurisdictions by the existing recognition that tax law deserves special attention from all branches of government. It is often enacted in its own statutes; courts and tribunals dealing specifically with tax and tax administration are common; and taxation is invariably administered by the executive through a separate arm of the civil service with varying levels of independence.

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47 For example, in Australia the Acts Interpretation Act 1901 (Cth); United Kingdom, Interpretation Act 1978 (UK); Canada, Interpretation Act (R.S., 1985, c. I-21).

48 P. Alston, 'A Framework for the Comparative Analysis of Bills of Rights' in P. Alston, above n. 1, p. 1.

49 For example, covering such issues as the meaning of common terms, the rules for calculating time or measuring distance, and the rules and procedures governing the delegation of authority.

50 J. Prebble, 'Why Is Tax Law Incomprehensible?' (1994) *British Tax Review*, 380.

51 This often happens in tax loss rules, e.g., the Australian Income Tax Assessment Act 1997 (Cth), Div. 36.

Adapting the wording of the Human Rights Act into the law governing tax administration but limited to the taxpayer's rights contained in that law, would not seem too great a leap for most governments. To prevent the possibility of competing or ill-considered declarations of incompatibility a further caveat should apply to prevent such declarations at first instance. Any declaration of incompatibility should only be issued by the relevant appeal court or tribunal in a jurisdiction that normally considers matters of law and procedure. The clauses could read:

- So far as it is possible to do so, primary legislation and subordinate legislation governing the administration of taxation must be read and given effect in a way that is compatible with the rights contained in this section.
- Where an appeal court is satisfied that a provision of primary or subordinate legislation is incompatible with a right contained in this section, it may make a declaration of that incompatibility.
- A report containing all declarations of incompatibility shall be made annually to the Minister responsible for revenue and a copy of the report shall be laid before Parliament.

A declaration of incompatibility would encourage the revenue authority and other relevant departments responsible for tax legislation to consider whether the incompatibility was intended. If it was not, it would provide the basis for amendment of the primary or subordinate legislation. The purpose of the annual report is to ensure that both the relevant minister and parliament are apprised of instances of incompatibility. Without any consequence arising from such a declaration, it could otherwise be ignored, particularly in the tax arena, where publicity for breaches of taxpayers' rights may not be considered newsworthy. It also provides some counter-balance to the argument that the power of the bureaucracy 'has undermined the theory that the Westminster model of responsible Government effectively guarantees democratic control of Executive power.'[52]

The approach taken does not include a statement to the effect of sections 4 or 5 of the New Zealand Bill of Rights Act. It recognizes that a tax act is an ordinary act and does not claim superiority either as a law or in its operation, except to the extent that if there is a choice, an interpretation should favour upholding, to the extent possible, the meaning that protects the legislated

[52] Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Perspective' in P. Alston, above n. 1, p. 454, p. 457.

taxpayers' rights. To do otherwise would go beyond the scope of an ordinary act containing rights pertaining to one aspect of the law.

However, Rishworth et al. identify some significant advantages that flow from an interpretation clause and that are taken seriously by the judiciary.[53] Interestingly, these advantages are sometimes found in judicial consideration of legislation imposing tax because of the presumption that an exaction of tax should be expressed precisely and make it clear that a tax is being imposed. However, once it is found that a tax is properly imposed, the margin of appreciation given to the revenue authority in its manner of administration, collection and enforcement is often broad — hence the need for an interpretation clause to protect legislative rights.[54] The points relevant to the approach suggested here can be summarised as:[55]

- by including taxpayers' rights in a statute, parliament expects an interpretive approach to accommodate them unless they are expressly or by necessary implication excluded;
- articulation of a fixed set of taxpayer's rights provides precision as to their content;
- it augments at least the common law method of interpretation by allowing and sometimes requiring courts to ascribe a meaning that protects rights where this would not necessarily follow from normal methods of interpretation; and
- it requires active judicial consideration of rights claims where this might not otherwise have occurred.

It can be seen from the common law approach to interpretation discussed in Chapter 3 that an interpretation clause does not go far beyond this position. However, the advantages set out above can only flow once there is a commitment to an interpretation consistent with enacted rights. Without a clause that requires such commitment, consistent interpretation is by no means assured.[56]

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53 Rishworth et al., above n. 37, p. 119 *et seq*.

54 D. Bentley, 'The Commissioner's Powers: Democracy Fraying at the Edges?' (1994) 4 *Revenue Law Journal*, 85.

55 Rishworth et al., above n. 37, p. 119 *et seq*.

56 Ibid., p. 132. Although, an interpretation clause should not be seen as a panacea in the context of the broader human rights experience. *See* A.W. Bradley, 'The Constitutional Protection of Human Rights in the Commonwealth' [1991] *Public Law*, 477.

4. Pre-legislative scrutiny[57]

Whether or not there is any form of subsequent protection inherent in the legislation, through entrenchment, interpretation clause or other mechanism, new legislation is not designed to contradict earlier legislation unintentionally. Any contradiction should be intentional. This is particularly so where the earlier legislation provides protection for rights. An interpretation clause focuses on the role of the judiciary after the legislation has passed. It is far more efficient to provide safeguards during the legislative process to remove unintended potential conflict between enactments.

The earlier case law of the United Kingdom in the European Court of Human Rights provides an example of where this would have been useful. By 1991, the European Court of Human Rights had decided against the United Kingdom on 28 occasions. Of these, 22 were direct violations of rights by domestic legislation enacted by Parliament. Instead of decreasing over time, as would be expected as the meaning of the protected rights became clear to Parliament, statutory violations increased. Seven cases of statutory violation were decided between 1975 and 1985 compared with 15 such cases between 1985 and 1991.[58] There were a number of solutions put forward and ultimately the Human Rights Act 1998 was passed. However, the various proposals put forward to increase parliamentary scrutiny of all legislation specifically to avoid statutory infringement of human rights might have been a useful interim measure.[59] A recommendation of the Select Committee on the Modernisation of the House of Commons to introduce monitoring of legislation has since been partially implemented in the UK.[60]

Canada saw the potential problems in its legislative process and introduced procedures specifically to scrutinise legislative proposals to ensure compliance with the 1982 Charter and the 1960 Bill of Rights.[61] Bills and their

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57 A comprehensive analysis of the arguments for and against pre-legislative scrutiny has been undertaken by D. Kinley, *The European Convention on Human Rights: Compliance without Incorporation* (Aldershot, Dartmouth Publishing Co., 1993).

58 The statistics in this paragraph are taken from D. Kinley, ibid., p. 11 and p. 181.

59 *See* D. Kinley, ibid., M. Ryle, 'Pre-legislative Scrutiny: A Prophylactic Approach to Protection of Human Rights' [1994] *Public Law*, 192; and F. Klug and J. Wadham, 'The ''Democratic'' Entrenchment of a Bill of Rights: Liberty's Proposals' [1993] *Public Law*, 579.

60 O. Hood Phillips, P. Jackson and P. Leopold, above n. 29, p. 242 and p. 247.

61 D. Kinley, 'Parliamentary Scrutiny of Human Rights: A Duty Neglected?' in P. Alston, above n. 1, p. 158, p. 163.

regulations are scrutinised by the Department of Justice before they are introduced into Parliament to ensure that they are consistent with the purposes and provisions of the two statutes.[62] Inconsistencies are reported to the House of Commons, which can still enact the legislation but only with an explicit statement that the provisions will operate despite the breach of the human rights laws.[63]

a. The need for pre-legislative scrutiny: an australian case study

Australia provides an interesting case study as it has no bill of rights, but it does have express and implied constitutional rights, common law rights[64] and is signatory to a range of human rights instruments including the International Covenant on Civil and Political Rights. Pre-legislative scrutiny commenced in earnest in Australia with the appointment of the Standing Committee on Regulations and Ordinances in 1932. In 1978 the Senate Standing Committee on Constitutional and Legal Affairs tried to extend the scrutiny to primary legislation and recommended that:

> a parliamentary committee should be established to maintain a watching brief on all bills introduced into Parliament so as to highlight those provisions which have an impact on persons either by interfering with their rights or subjecting them to the exercise of undue delegations of power. A joint committee would enable consideration of bills as soon as they are introduced into the Parliament, regardless of the House into which they are first introduced, and it would enable members of both Houses to properly fulfil their obligations in respect of legislative scrutiny.[65]

The committee's recommendations were rejected by the government on the grounds, that the legislative process might be delayed and that ample opportunities for scrutiny already existed.[66] This conclusion was questionable and in

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62 Ibid.

63 Ibid.

64 Discussed in J. Doyle and B. Wells, 'How Far can the Common Law go towards Protecting Human Rights?' in P. Alston, above n. 1, p. 17.

65 *Report on Scrutiny of Bills,* Parliamentary Paper No. 329/1978.

66 A. Missen, 'Senate Committees and the Legislative Process', in J.R. Nethercote (ed.), *Parliament and Bureaucracy* (Sydney, Hale and Iremonger, 1982), ch. 8.

1981 the Senate Standing Committee for the Scrutiny of Bills was appointed to review primary legislation. Nonetheless, the concern is that although policy issues may well be debated at length, the technical detail of legislation is seldom afforded sufficient scrutiny.[67]

> 'Technical details' here may well involve important questions of civil liberties such as search rights without warrants, reversal of the onus of proof and the absence of appeal rights. The excessive complexity of modern drafting of Commonwealth legislation adds to the problem.[68]

Support for this contention was found in a study of provisions of bills passed by parliament in 1980 and 1981 by the staff of the Regulations and Ordinances Committee. The bills were measured against the same principles applied to delegated legislation. A significant number of provisions were found, which if they had been 'presented as regulations or ordinances, would have been reported to the Senate and strongly queried'.[69]

This is hardly surprising and, despite the efforts of the Committee for the Scrutiny of Bills, little improvement should be expected for a number of reasons that are prevalent across jurisdictions using different procedures. The mean time spent in parliamentary scrutiny of legislation is on a downward trend. In 1993 in Australia, just over five minutes was the mean time spent considering each page of primary legislation.[70] This figure is certain to have decreased, as 'the volume of primary and subordinate legislation considered by

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67 The House of Representatives Standing Committee on Legal and Constitutional Affairs, *Clearer Commonwealth Law: Report of the Inquiry into Legislative Drafting by the Commonwealth* (Canberra, AGPS, 1993), p. 179, stated that, 'the Committee believes that consideration of legislation in standing committees may well help enhance the quality of scrutiny of legislation and thus the standard of legislation'. A. Missen, above n. 66, p. 130. A Scrutiny of Legislation Committee was set up in the State of Queensland in 1995 under the Parliamentary Committees Act 1995 (Qld), following the success of the Federal committee.

68 Ibid.

69 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n. 67, p. 170.

70 Ibid. R. Hazell, in 'Time for a New Convention: Parliamentary Scrutiny of Constitutional Bills 1997-2005' [2006] *Public Law*, 247, 250 *et seq.*, provides a comprehensive table of similar statistics for UK bills of a constitutional nature. Hazell's article strongly supports the validity of the scrutiny process in the context of limited opportunity for full consideration of bills on the floor of parliament.

Parliament or its committees has generally increased each year'[71] and has shown no sign of diminishing. Furthermore, laws affecting the rights of taxpayers are more likely to be declared to be urgent and guillotined, dealing mainly as they do, with finance matters. Senate use of a cut-off date, after which Bills received from the House of Representatives are automatically adjourned to the next sittings, often forces finance bills even more quickly through the House of Representatives, reducing even further the time available to scrutinise the legislation.[72] This is in part a function of parliamentary process, for governments do not like to allow extended debate on areas in which they might be vulnerable to opposition questioning.

Drafting errors add to the problem. In his submissions to the Inquiry into Legislative Drafting by the Commonwealth, lan Turnbull QC, then First Parliamentary Counsel, made it clear that the unrealistic deadlines placed upon drafters of legislation mean that they often do not have the time to review the finished product adequately.[73] He went on to say 'but I think our problem is that we do have deadlines that are far too tight and they are made worse by the fact that policy changes are made at a late stage'.[74]

Where a parliamentary inquiry finds that parliamentary scrutiny of legislation is minimal and that the demands placed on the drafters of that legislation are too great, both the drafters and the quality controllers are put in the invidious position of relying on each other's work to maintain the detailed quality of the legislation.

b. Recommendations

There are obvious problems in setting up effective pre-legislative scrutiny given the incredible pressure that exists on those involved in drafting, debating and passing legislation. The parliamentarians, who would in most countries undertake the scrutiny, face enormous pressures.[75] However, such scrutiny

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71 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n. 67, p. 168.

72 Ibid., p. 174.

73 For example, in his submission at p S280, ibid., p. 161, he said that: 'When a law is completely drafted and the drafter is satisfied that it has the correct legal effect, the drafter should then review the whole law in order to simplify it as much as possible. This step is usually denied through lack of time.'

74 Ibid., p. 163.

75 For a vivid description of the position in the UK, *see* D. Feldman, 'Parliamentary Scrutiny of Legislation and Human Rights' [2002] *Public Law*, 323, 324 *et seq.*

provides a necessary form of quality control to give effect to rights legislation of any kind. It prevents the need to resort to the courts unnecessarily to resolve unintended incompatibility of, or inconsistency with, subsequent enactments and rights contained in existing legislation.

It may be considered excessive to have a scrutiny committee ensuring that taxpayers' rights are not breached by finance bills and other tax legislation. This would have substantive elements and would not simply be a procedural review. However, given the speed with which such bills are passed and the complexity of such legislation, the establishment of a pre-legislative scrutiny committee to consider them makes sense. A committee of this kind would work more effectively in jurisdictions where there are two houses of parliament, if it were a joint committee of both houses. Both houses are required to give attention to the content of such bills and should be equally involved in the scrutiny so that both houses can be equally well informed in the event of incompatibility that is left unamended.[76]

Scrutiny of legislation by committee already takes place in many jurisdictions.[77] The committees' presence as part of the legislative process gives them the credibility and influence necessary to be effective. The proposal to extend such scrutiny to protect legislated taxpayers' rights involves little innovation, but gives the specific focus necessary to guard such rights adequately. The vetting should extend to delegated taxation legislation.

The advantages of including such scrutiny in the legislative process go beyond mere quality control. The successful operation of the existing scrutiny committees 'demonstrates the potential for the protection of broad principles of rights and liberties through scrutiny of legislation by parliamentary committees'.[78] As pointed out by Ryle,[79] it would be an embarrassment to ministers to have their legislation the subject of a formal report from a parliamentary committee pointing out the ways in which their legislation potentially breached legislated taxpayers' rights. It should be emphasised that this is the purpose of a scrutiny committee: simply to examine bills, assess whether or not those bills appear to breach the agreed standards and to report to parliament.[80] Nonetheless, faced with such scrutiny, more care would likely be taken in the preparation.

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76 D. Kinley, 'Parliamentary Scrutiny of Human Rights: A Neglected Duty?' above n. 61, p. 182.

77 A selection is mentioned in D. Oliver, 'Improving the Scrutiny of Bills: The Case for Standards and Checklists' [2006] *Public Law*, 219.

78 D. Kinley, above n. 57, p. 103.

79 M. Ryle, above n. 59, p. 194.

80 D. Feldman, above n. 75, p. 332.

Associated with pre-legislative scrutiny there are administrative and process arrangements that strengthen its operation. In many jurisdictions the Minister is required to make a statement of the impact of legislation when it is introduced.[81] This should extend to a requirement to point out when there could be inconsistency between the proposed legislation and existing legislated rights. It should also note where administrative arrangements resulting from the proposed legislation would negatively affect published administrative rights. In most cases, there may be no effect on rights. However, for the executive to engage in the rights process, it is important that it is required to exercise its mind on the impact of legislation on existing rights rather than assuming that there is no impact and not considering it at all.

The corollary to this is that the standing orders or rules for the drafters of legislation, whether this is in a separate office of the parliamentary draftsman or in the relevant department, should make reference to the reports of the scrutiny committee. If the scrutiny committee is regularly asking for reports on similar aspects of legislation, it is important that this is taken into account in future drafting. The reports should engender engagement by policymakers and drafters of legislation in the potential difficulties that can arise and they should seek to remedy those difficulties in future legislation. The thrust of the legislation will not necessarily change. However, an awareness of perceived problems in the past will enable the drafters to consider similar issues in advance and thereby improve the 'rights-friendliness' of the legislation.

The committee scrutiny process can provide the opportunity for submissions from experts and interested parties, which should then be published. This would add to the general understanding of what is meant by the rights and should lead ultimately to better legislation.[82] Without external input, publication and transparency there is a risk that the scrutiny committee could simply become a rubber stamp body controlled by the party in power. This would be a particular danger in a jurisdiction where the government had a strong majority both in parliament and on the scrutiny committee. However, regular external submissions may be impractical given the speed with which revenue legislation must often be considered. There is no point having a scrutiny committee that cannot report in time for it to be considered by parliament in its debate on

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81 *See, for example*, D. Rodrigo, 'Regulatory Impact Analysis in OECD Countries: Challenges for Developing Countries' paper presented at South Asian-Third High Level Investment Roundtable (June 2005) under Regulatory Management and Reform, <www.oecd.org>, 1 November 2006. The OECD is encouraging development of Regulatory Impact Analysis as a government best practice.

82 M. Ryle, above n. 59, p. 195 and D. Feldman, above n. 75, p. 333.

the proposed legislation. External input is beneficial, with the caveat that it must be possible and not defeat the purpose of the committee through the delays in reporting that it necessitates.

Before reporting and after receiving submissions or hearing representations, as appropriate, the committee would seek explanation for potential discrepancies from the relevant government departments. This has worked effectively in Australia to allow departments to explain much more fully the meaning and intent of detailed technical legislation that would not be possible on the floor of parliament.[83] Critical to the effectiveness of any scrutiny committee is its powers to gain information. It has been a major contributory factor to successful scrutiny committees[84] and is based firmly on the principle of parliamentary sovereignty. Without an acceptance by departments that parliament has the right, under the principle of the separation of powers, to seek clarification and explanation, scrutiny committees are likely to be less effective. This is not so much a matter for the design of a Model and its processes as the relevant parliamentary committee powers and procedures.

Feldman identifies five likely responses by a department faced by a query. They are based on his experience with the UK scrutiny committees responsible for scrutiny of rights legislation.[85] I adapt Feldman's analysis here to the Model and add a sixth.[86]

1. The department may disagree that a right is affected by the proposed legislation.
2. In response to a concern raised by the committee about the extent of a discretion, the department may argue that a discretion exercised in a way that breaches a legislated right would be in breach of the law. The committee may dispute the need for safeguards to the exercise of the discretion on this basis.[87]
3. The department may argue that any interference with a right is justifiable.

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[83] *See* the responses to queries from the Senate Standing Committee for the Scrutiny of Bills by the Minister and Assistant Treasurer on the retrospectivity of tax legislation, e.g., in *First to Sixteenth Reports of 2002* (Canberra, Commonwealth of Australia 2002), p. 421.

[84] *See generally*, D. Feldman, above n. 75.

[85] Ibid., p. 334.

[86] D. Feldman, ibid., does not raise this point as it had not occurred in the UK context at the time of his article.

[87] A. Lester QC, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' [2002] EHRIR 432, 445.

4. The department may accept that there is a problem, but suggest that it is dealt with by a guideline, ruling or other form of delegated legislation.[88]
5. The department may accept that there is a problem, but want to defer remedying it until there is a general review of the area.
6. The department may accept that there is a problem and amend the bill.

In addition to departmental responses, committee reports laid before parliament may generate debate. The debate may also lead to amendment or further clarification. The most important issue is that there is transparency and understanding about potential contradiction, incompatibility and inconsistencies between taxpayers' rights and new legislation. Even if it is argued by the executive and accepted by parliament that these problems do not exist, they should be raised. Often it will not be the bill in question that is affected. Government has a vested interest in defending its position and may neither have the inclination nor the need, provided it has a majority in parliament, to change it. However, it is likely that subsequent bills will be presented with a clear understanding of concerns that will be raised. Where possible, legislation will be drafted to avoid such questions arising again, simply because the government prefers not to engender questions that might give rise to opposition to legislation. That is, unless an inconsistent position is deliberate. Parliamentary scrutiny committees therefore raise an awareness of inconsistencies and other problems not just for particular bills but also in the areas where such problems are likely to arise more broadly and should be avoided in future.

There are disadvantages to such a committee. There is a danger that the committee chosen to scrutinise legislation would have numerous other responsibilities and that the pressure of time would diminish their effectiveness in this particular area.[89] Bills involving taxation matters are often the subject of particular time pressure, which may further reduce the committee's effective review of the fine detail. One of the major advantages of a scrutiny committee is to draw attention to offending legislation. If Parliament is unmoved by legislative breaches of rights included in revenue legislation, the scrutiny committee and, subsequently, the legislation giving rights, will lose much of its effect. This may not be a far-fetched scenario, given the tendency for tax legislation to escape scrutiny in respect of individual liberties.[90] Nonetheless,

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88 Ibid., p. 439.

89 *See* D. Feldman, above n. 75, p. 327.

90 *See further* the discussion in F.D.A.M. Luoga, 'The Viability Of Developing Democratic Legal Frameworks For Taxation In Developing Countries: Some Lessons From Tanzanian Tax Reform Experiences' [2003] *Law, Social Justice and Global*

legislative enactment together with a scrutiny committee should provide sufficient weight to balance the expediency argument that use of a scrutiny committee alone might not. Having said that, in an adversarial political environment there is always the danger that a scrutiny committee might become a tool to harass ministers or focus on political rather than legislative negatives.[91]

To overcome subjective bias and obvious political capture of a scrutiny committee, Feldman notes the importance of the scrutiny taking place against an accepted set of standards.[92] In this instance it would be against the standards incorporated into legislation from the Model. Both Hazell and Oliver endorse the use of statements of scrutiny standards and checklists to improve the effectiveness of scrutiny committees.[93] The checklist for scrutiny of legislation devised by the New Zealand Legislative Advisory Committee is comprehensive.[94] This is appropriate particularly for review of legislation to ascertain compliance with a formal bill of rights. However, a less comprehensive set of requirements would likely suffice in most jurisdictions to ascertain simply whether new tax legislation has the potential to interfere with the operation of rights contained in the tax law.

The caveat on the use of standards and checklists is that they must not be used as a check-the-box mechanism that obviates the need for the scrutiny committee to exercise its mind on the matters before it. There is no point having a rubber stamp scrutiny committee. Feldman makes the point that

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Development, <elj.warwick.ac.uk/global/issue/2003-2/luoga.html>, 27 December 2005; and sometimes arguably even in OECD countries: *see* D. Bentley, above n. 54; D. Williams, '*Donovan's* Case and the Further Abrogation of the Rights of the Individual' [1992] *Butterworths Weekly Tax Bulletin*, 182; and B. McCabe, 'The Investigatory Powers of the Commissioner Under the Income Tax Assessment Act and Individual Rights' (1993) 3 *Revenue Law Journal*, 1.

91 Discussed in D. Feldman, above n. 75, p. 328. Evidence can be seen of opposition use of information derived from scrutiny committees in A. Lester, above n. 87, p. 439 *et seq.* However, it is the role of Parliament to obtain information from the executive to justify its proposals. Accordingly, it is important that the information obtained by a scrutiny committee is used in debate, even though the approach taken by the committee in obtaining that information is designed to assess it objectively against prescribed standards.

92 D. Feldman, ibid., p. 329.

93 R. Hazell, above n. 70 and D. Oliver, above n. 77. They support the proposition for the use of checklists made by the Constitution Committee of the House of Lords, in its Report on *Parliament and the Legislative Process*, Fourteenth Report (2003-2004 HL 173-I).

94 Available at <www.justice.govt.nz>, 20 November 2006, and discussed in D. Oliver, above n. 77, p. 235 *et seq.*

the better scrutiny committees are seen as bi-partisan committees, which avoid emotive language, have a relatively cut-and-dried approach and use objective criteria to make their assessment of proposed legislation.[95]

A parliamentary pre-legislative scrutiny committee is no panacea. It is only as effective as its members and the credibility that it has in the parliamentary process and with the government departments involved in legislative drafting. However, it does provide a useful and relatively objective means of ensuring that where there is contradiction, incompatibility or inconsistency between legislated protection of taxpayers and proposed bills, it is identified. To reiterate, parliaments usually prefer not to override rights and protection given to citizens unintentionally. Pre-legislative scrutiny helps to achieve this objective and can usefully be incorporated into a Model for adoption within most parliamentary systems.

5. Ordinary legislation

Legislative protection of taxpayers' rights does provide significant protection. The rights associated with legislation provide support for the legislated rights in a more substantive legal way than can ever be the case with administrative rights. Primary legal rights and some secondary legal rights require statutory enforcement or else they become simply aspirational. For example, the rights to certainty under the law and to prospective legislation are without any force or effect if they are not included within a statute or as part of a statutory interpretation clause. It is not within the powers of the revenue commissioner or any administrative body to enforce a right to certainty in legislation or to require the legislature to enact laws prospectively.

Many secondary legal rights can be implemented as primary administrative rights. When this is done, the content tends to change and broaden so that the nature of the rights protected is different. However, where rights are legislated a revenue authority is also likely to want to avoid the possibility of breach and is likely to go to greater lengths to ensure that they are observed. These efforts may err in favour of the taxpayer and could therefore in effect extend those rights.

Ordinary legislation of primary and secondary legal rights in a tax statute can overcome the uncertainty that can arise where existing legal rights contained across a range of different laws are applied to matters concerning taxation. The

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[95] D. Feldman, the Miegunyah Public Lecture, 'The Roles of Parliaments in Protecting Human Rights: A View from the UK', Centre for Comparative Constitutional Studies, (University of Melbourne, 20 July 2006) p. 10 and p. 17, <cccs.law.unimelb.edu.au>, 11 November 2006.

advantage of specific provisions in the tax legislation is that the rights are given clarity and, to the extent set out in the specific provision, offers clearer protection to taxpayers. A reading down of rights is more the problem of piecemeal legislation that is enacted over a period of time to protect taxpayers' rights.

However, to provide protection, legal rights must also receive the backing of the courts. The United States' Omnibus Taxpayer Bill of Rights, enacted in 1988, was intended to make a 'major and substantial change in the fundamental relationship between the taxpayer and the tax collector'[96] and to implement 'a number of measures intended to better define and limit the [Internal Revenue] Service's collection and enforcement powers'.[97] The success in achieving this may have been limited by the courts. For example, it is argued that the courts have, by using a primarily text-based interpretive approach, stripped at least one section 'of much of its meaning and placed it at odds with the broader purposes behind the enactment of the Taxpayers' Bill of Rights'.[98] This may or may not be a valid analysis. However, if Posner is right, when he argues that the answers to many legal questions:[99]

> depend on the policy judgments, political preferences, and ethical values of the judges, or (what is not clearly distinct) on dominant public opinion acting through the judges, rather than on legal reasoning regarded as something different from policy, or politics, or values, or public opinion,

then the force of legal rights depends very much upon the legislature carrying the courts with them.[100]

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[96] Representative Tallon, 134 Cong. Rec. H9980 (daily edn., 12 October 1988) cited in D.L. McClain, '*United States v. Leach*, and Internal Revenue Code Section 7521(c): Applying a Text-Based Analysis to Provisions of the Tax Code' [1991] 77 *Iowa Law Review*, 371, 372.

[97] D.L. McClain, ibid., p. 373.

[98] Ibid., p. 401.

[99] R.A. Posner, 'The Jurisprudence of Skepticism' [1988] 86 *Michigan Law Review*, 827, 829. Posner also makes the point here (at 852) and (more fully) in R.A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987' [1987] 100 *Harvard Law Review*, 761, that judges in the United States, at least, tend to misuse interpretive canons to the extent that 'statutory analysis is the least edifying form of judicial writing today'.

[100] A concern is that the arguments of Schauer and Posner suggest that judges, in common with most decision-makers, are inherently conservative in outlook, so that for secondary legal rights to have the same effect as primary administrative rights will first require a series of strong precedents to be set by the courts.

Where there are statutory rights and they have express support in the tax law, taxpayers may ordinarily pursue an action through the courts. The most important reason for taxpayers deciding not to pursue an action through the courts to enforce the protection is that of cost. As most tax disputes involve relatively small sums of money, the cost of pursuing an action in court is a sufficient deterrent to most taxpayers from seeking relief in this arena. A further deterrent is the likelihood that if the taxpayer wins a case at first instance, the revenue authority is likely to have both the resources and the inclination to appeal the case to seek clarification of the law at a higher level. A revenue authority would not usually invest in litigation where it did not feel that its view of the law was more likely to be correct than not.

Primary and some secondary legal rights must be legislated to have effect. Other secondary legal rights are similar to primary administrative rights in that they are based on the same underlying principles. The difference in the content is found in the level of enforcement afforded. This is explored further in Chapter 8, which analyses the content of the rights included in the Model. The greater the level of enforcement by statute and at common law, then usually the scope of the right protected is more limited, although this is not a necessary development. Accordingly, when identifying rights it is vital to emphasise this definitional aspect, whether they are legal or administrative rights, or confusion can result. Policy-makers must also decide for the secondary legal rights that can be enforced as primary administrative rights, which medium provides the most appropriate form of protection in the context of that legal environment.

B. Conclusion

To sum up, it is preferable that both primary and secondary legal rights are legislated expressly as part of the revenue legislation, in conjunction with a scrutiny committee and an interpretation clause. It may be detrimental to the enforcement of these rights to rely on existing statutory protection, which is likely to be interpreted narrowly by the courts. Nonetheless, the Model should not include an article requiring all legislation protecting taxpayers' rights to be included in a separate statute as that starts to interfere with the contextual requirements of each jurisdiction. It is simply a recommended approach.

The Model also cannot specify whether a right should be enforced legislatively or administratively. For example, a problem with any legal right is that it may be less accessible to the taxpayer to enforce than an administrative right and may not protect the rights of taxpayers in relation to the detail of

process in the ordinary operation of the tax system. On the other hand, leaving protection in the hands of powerful administrators, whose discretion is effectively beyond political or legal challenge may prevent any protection from being available.[101] The choices between the types of enforcement at this level depend heavily on the context and environment. Primary and secondary administrative rights and administrative goals form part of most revenue administrations. The extent to which they are enforceable is critical to taxpayer protection and Part 2 explores enforcement methods.

III. Administrative mechanisms and enforcement

A. Introduction

Chapter 2 outlined how administrative enforcement has developed in a context of simplification of tax laws, the introduction of self-assessment systems and the development of a 'client' centred approach to taxpayers. Revenue authorities are moving away from a 'command and control'[102] culture to one designed to build trust, support and respect in the community.[103] Although an emphasis on taxpayers' rights is part of this process, it is usually developed within the framework of powers already delegated to the revenue authority.

Chapter 3 identified that protection of rights should reinforce those principles underlying the tax system. The nature of the interpretation of rights lends itself to both legislative and administrative protection. The first part of Chapter 4 noted that his has given momentum to ensure administrative protection of taxpayers is in place. Some of this has taken the form of legislated mechanisms for protection, such as those included in the US Taxpayer Bills of Rights. Ombudsmen and taxpayer advocates have been appointed either legislatively or administratively in many jurisdictions. Where mechanisms are legislated, the protection itself is still largely by way of administrative process. Chapter 4 also noted that where a right is administrative, particularly where it involves

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101 Y. Ghai, notes that colonial administrators in Kenya were in this position and that a similar position can exist today in patrimonial societies, 'The Kenyan Bill of Rights' in P. Alston, above n. 1, p. 187 and p. 236 *et seq*.

102 V. Braithwaite, 'A New Approach to Tax Compliance' in V. Braithwaite (ed.), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Ashgate, Aldershot, 2003), p. 1.

103 Ibid.

the exercise of discretion, the content can become less certain simply by virtue of the discretion.

Chapter 4 notes a number of administrative mechanisms that contribute explicitly or implicitly to the enforcement of taxpayers' rights. They are described in Chapter 4 as the determinant for the classification of the rights as primary or secondary administrative rights or administrative goals. Primary administrative rights and to some extent secondary administrative rights are supported by some overt mechanism for enforcement. To have effect, administrative goals usually depend upon the existence and application within the revenue authority of social rules or quality assurance mechanisms.

The mechanisms that can be used are wide-ranging. Primary and secondary administrative rights are often protected at least to a limited extent by administrative law, administrative procedures; and independent officers or bodies that provide a form of investigation or complaints handling. Administrative decisions are normally guided by legislation and other rules governing their exercise. However, the right of review of the exercise of delegated administrative discretion is usually limited to facilitate the administrative decision-making process. That said, where first instance tribunals hear appeals against decisions of revenue authority decision-makers, they may be placed in the position of the decision-maker so that they can revisit the decision where there are strong grounds for doing so.[104] There is also a range of independent review mechanisms such as the United Kingdom Revenue Adjudicator, the US Taxpayer Advocate and the Australian Special Tax Adviser to the Commonwealth Ombudsman.[105] Where these or similar bodies exist, they provide added support for the enforcement of administrative rights.

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[104] For example, in Australia, the Administrative Appeals Tribunal, in reviewing a decision, may exercise all the powers and discretions that are conferred upon the Commissioner of Taxation: Administrative Appeals Tribunal Act 1975 (Cth) s. 43.

[105] The word 'ombudsman' is a word derived from the Swedish and does not reflect the gender of the holder of the office. Although it is acknowledged that various shortenings are preferred by many authors, no single alternative has found broad acceptance and the original term is therefore used in this book to avoid confusion. United Kingdom Revenue Adjudicator, <www.adjudicatorsoffice.gov.uk>, 1 November 2006; US Taxpayer Advocate, <www.irs.gov/advocate>, 1 November 2006; and Australian Commonwealth Ombudsman, <www.comb.gov.au>, 1 November 2006. *See further*, M.E. Kornhauser, 'When Bad Things Happen to Good Taxpayers: A Tale of Two Advocates' (16 February 1988) *Tax Notes International*, 537, who emphasises strongly the importance of the independence of an ombudsman.

Interestingly, the Internal Revenue Service Restructuring and Reform Act of 1998[106] in some cases uses compliance with the Internal Revenue Manual as the basis for legal action,[107] even though it was designed only to provide administrative guidance to revenue officers.[108] The Internal Revenue Manual comprises mainly secondary administrative rights. The attempts by the legislature to use it as a legislatively binding instrument have been critiqued for introducing effective paralysis of the administrative decision making process in those areas affected.[109] If there are legislative penalties for improper use of a daily administrative procedure, the administrators will naturally try not to use it in case they make a mistake. Turning secondary administrative rights that govern the practical daily tasks of tax administration into enforceable secondary legal rights can therefore be counter-productive. When designing a model it is not so much the type of enforcement that makes the model effective, but the appropriateness of the enforcement for the right provided. This was the underlying theme of the analysis in Part 1 and remains so in this Part.

As discussed in Chapter 4, administrative goals, although they are simply goals, are often enforceable, particularly in strong democracies. Administrative Charters are discussed at length in Chapter 7. There is often a combination of factors that make administrative goals more effective than they appear. Administrative will is an important element, particularly given the focus in recent decades on improving public service guidelines and practice. Recent trends towards improved governance and risk management provide a further boost to the implementation of published promises and guidelines. So, too, does a performance-based management approach using objective measures such as key performance indicators or benchmark measures to judge performance of the revenue authority. Indicators such as response rates, turn-around times, and measurement of complaint levels can provide more immediate support for taxpayers in their quest for transparent due process than any number of legal avenues for appeal. Where parliament or a minister requires a periodic report from a revenue authority on how it is meeting its administrative goals, it tends to place internal pressure on the revenue authority to perform. This is so particularly in those jurisdictions where government at

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106 Pub L No. 105-206.

107 *First Federal Savings and Loan Association v. Goldman,* 644 F Supp 101, 102 (WD Pa 1986).

108 Discussed in B.T. Camp, 'Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998' (2004) 56 *Florida Law Review* 1, 105 *et seq.*

109 Ibid., p. 107.

all levels is relatively transparent. As discussed in Chapter 7, the relative failure of tax administrations in Africa is due in part to transparency and governance issues.

Human rights legislation, of which legislation of taxpayers' rights arguably forms part, is sourced in higher level principles. Taxpayers are usually oblivious to those higher level human rights principles when they have a practical problem with the administration of the tax system. Their interest is not, for example, in whether there has been a breach of the principle of reasonableness; but rather why a tax officer is exercising discretion to impose a 10 per cent late lodgement penalty even though the taxpayer's partner was having complications with her pregnancy and the taxpayer had to spend two weeks going backwards and forwards to the hospital instead of completing his tax return. Taxation is one of the most significant and pervasive ways that a government interacts with its citizens. The daily interaction is therefore very important for good government and to maintain a stable society.

Many governments recognize the risks of governing badly. They introduce quality control mechanisms that have become increasingly powerful. The auditor-general and other oversight agencies are prevalent in most modern states to provide what is seen as essential oversight and review of the operation of government and its agencies. The power of government may be based in statute, but its exercise is executive. As discussed in Chapter 4, this power is expanding and there are associated dangers. To some extent sensible governments have ameliorated the dangers in the growth of executive government by providing significant oversight and review to a wide range of bodies that hold its departments to published service standards and operational guidelines. Regular published reports provide a transparency in the operation of government that was simply not contemplated in the past.

Oversight and review agencies provide a framework for government to take a proactive approach to dealing with the problems of its citizens. Recourse to the courts is somewhat random and for it to be useful for a larger number of people depends not only upon a case being brought, but one that is both relevant to a class of citizens and results in a change in the way government operates. It does not provide the consistent and comprehensive remedy to ineffective operation of government that both government and its citizens requires.

An ombudsman or similar review body, by contrast, is accessible to the general public and can take up a much more comprehensive range of issues and problems than can the courts. Courts are severely limited in the issues that they can consider. An ombudsman can look into almost any administrative decision or problem, often including those of non-government bodies that are acting on behalf of government, for example, where there has been outsourcing. An

ombudsman or similar review body has a wide range of flexible remedies that can be adapted to the context and the individual. Complaints handling systems and standards are the hallmark of modern dispute resolution in government departments. They focus on the systems and processes in such departments to make sure that there is compliance with accepted standards of customer service and dispute resolution. The systematic review, reporting and other forms of quality assurance does not produce a perfect system. It does produce a wide range of accessible and widely used methods and forums for dissipating problems at the administrative and practical level before they escalate.

Where courts cannot follow up on whether their findings and recommendations have been implemented, a review mechanism such as an ombudsman's office can. Throughout government, including the tax administration, officers of the ombudsman's office and similar review bodies can be involved in internal and public education programmes, the media, and other forms of awareness building. It is difficult to identify specific enforcement processes that provide a clear remedy for a taxpayer with a problem. However, the change in the daily operation, management and culture of government in many countries over the last two decades has resulted in an environment in which administrative remedies are available. The remedies may come in a soft form, but they are often more real and effective for the individual taxpayer, nonetheless.

Clearly, therefore, performance indicators and benchmarks are an important component of performance measurement to the extent that they can help to assess the quality of revenue administration and how the services provided are meeting the promises made. They are discussed further in light of recent research in Chapter 7. They are the means by which taxpayers can hold the revenue authority to account in its provision of administrative rights and progress towards published administrative goals. Rather than set out in the Model a set of benchmarks or performance indicators, it is sufficient to state that the revenue authority will measure its performance through a transparent process of quality assurance based on published objective measures.

These measures provide transparency and quality control. However, the enforcement effect is implicit. Where the revenue authority does not meet its published goals it could be argued that there is no formal sanction. This is to misunderstand the shift in management of government that has taken place.

Primary and secondary administrative rights do offer enforcement mechanisms. Such sanction and the other inherent advantages of administrative rights identified in Chapter 4 will ensure that delegated decision-making and regulation within the revenue sphere will continue to grow rapidly. It will be deemed better for the revenue authorities to deliver taxpayers' rights within a defined administrative framework. This will maintain maximum

flexibility in the administration of the tax system without requiring determination of rights by the courts after long and expensive litigation. As the scope of administrative discretion and determination of the content of the law increases through mechanisms such as administrative regulation, taxation rulings and formal circulars, the administrative protection afforded to taxpayers becomes commensurately more important.

As discussed, the mechanisms for enforcement are wide ranging. However, they are all concerned with the ability of the taxpayer to enforce a published right at an administrative level. Court-based mechanisms are largely confined to supporting legal rights. Administrative problem resolution processes and review bodies support administrative rights.

One approach to an analysis of these processes and bodies would be to compare and contrast the administrative enforcement mechanisms in use in different jurisdictions. It would be a somewhat complex way of finding best practice. The alternative approach, used here, starts with alternative dispute resolution (ADR) theory to identify the characteristics of effective administrative enforcement. Provided these are present in a system it does not much matter what the mechanism is called or the form it takes. Administrative enforcement mechanisms vary according to jurisdiction, legal system and a range of factors specific to that country. To try to designate what a mechanism should look like is a pointless exercise when it is the practical protection that it affords taxpayers that is important.

The remainder of this Part identifies the characteristics of effective administrative enforcement, illustrating these characteristics through a case study application to the processes provided for in the Australian Taxpayers' Charter. It is important to note that the reference to ADR theory is necessarily introductory given the limited scope of the book. There is scope for a substantial analytical work on this area alone. However, even at an introductory level it provides a framework to assess the mechanisms used and to suggest minimum standards of dispute resolution procedure to protect administrative rights. These mechanisms are essentially based in variations and mixes of negotiation, conciliation/mediation and arbitration and are in wide use in tax administration all over the world.[110] The focus of these mechanisms

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[110] An introduction to the theory may be found in W.L. Ury, J.M. Brett and S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (Cambridge, MA, Program on Negotiation Books, 1993). Dispute resolution in tax administration is particularly well advanced in the US, *see*, *e.g.*, T. Carter Louthan and S.C. Wrappe, 'Building a Better Resolution: Adapting IRS Procedures to Fit the Dispute' (1996) 13 *Tax Notes International*, 1473 and A.P. Mostovi, 'Tax Mediation: Is

on a problem-solving approach to dispute resolution is consistent with the current emphasis by revenue authorities on building and maintaining strong compliance relationships with taxpayers.

The ADR principles are not jurisdiction specific, although reference in this book is mainly to US and Australian ADR theory, which is at the forefront of research, particularly in the legal context. ADR principles can be applied in the design of any dispute system, but it should be so that they make sense in the broader context of the pre-existing social, cultural, legal, economic and administrative frameworks. For a dispute resolution system to work as part of the administration of a tax system, Chapter 7 demonstrates the importance of embedding it rather than imposing it. In some jurisdictions it simply will not work to protect taxpayers' rights while the administration and judiciary remain plagued by corruption. However, in jurisdictions where there are appropriate and effective frameworks for conflict resolution, the protection of taxpayers' administrative rights follows.

From a rights perspective, it is important to note that once revenue authorities acknowledge that taxpayers have interests that need to be considered and taken into account, there is an immediate and substantial increase in taxpayer protection flowing directly from this engagement. Informal dispute resolution processes developed within tax administrations are likely to provide the most significant practical increase in taxpayer protection. A revenue authority itself has much to gain from processes that identify and resolve potential disputes early on to prevent escalation, maintain good relationships with taxpayers, and encourage compliance. Lower level conflict resolution processes that are part of a revenue authority's general engagement with taxpayers also ensure that they can be accessed by a much wider group of taxpayers. Traditionally, mechanisms to resolve conflict were restricted to specific areas, such as audit resolution, or to those taxpayers who had already escalated a conflict to the level of a formal dispute in a tribunal or court.

The layers of dispute resolution found within tax systems are a relatively recent phenomenon. Much work has been done on the design of dispute systems of this kind. ADR provides flow-on improvements in taxpayer compliance by making it easier to resolve disputes with the revenue authorities or even to allay concerns. It also improves the effectiveness and efficiency of tax administration, as ADR focuses on avoiding time-consuming and expensive

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it Just a Test?' (1996) 13 *Tax Notes International*, 1871. For a critique of the adversarial approach to dispute resolution, *see* B.T. Camp, ibid. For a useful fundamental analysis of the design of a dispute system, *see* W.L. Ury, 'Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design' (1995) 11 *Negotiation Journal*, 379.

litigation before the courts.[111] The Chapter concludes with recommendations that flow from the analysis on the framework for enforcement of administrative rights.

B. Definitions

To understand the suggested mechanisms, it is important to differentiate between types of conflict resolution. Needless to say the definitions used vary, but there is sufficient consensus among ADR theorists to draw for clarity basic definitions of negotiation, conciliation/mediation and arbitration. There will be disagreement on the boundaries and nuances and the reality is that the mechanisms used are often a variation or mix.[112]

1. Negotiation

> Negotiation in its simplest form involves disputants contacting each other and seeking a mutually acceptable outcome through discussion, without the assistance of other persons. . . . Negotiation takes place in a climate of rules, both social and legal, and against a background of other possible processes for resolving the dispute, which may include litigation.[113]

Negotiation is the traditional approach to informal dispute resolution between taxpayers and the revenue authority, but in the context of the formal transactional relationships created by legislation, such as debt collection processes. It is still the fundamental dispute resolution mechanism used, but in a much more flexible and less rigid way, as is shown in the case study below.

Independent problem resolution units or case officers charged with negotiating solutions to disputes with taxpayers now exist within many tax

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111 *See, e.g.*, L. Boulle, *Mediation: Principles, Process, Practice* (2nd edn., Sydney, LexisNexis Butterworths, 2005) p. 139; H. Astor and C.M. Chinkin, *Dispute Resolution in Australia* (2nd edn., Sydney, LexisNexis Butterworths, 2002); and P. Condliffe, *Conflict Management: A Practical Guide* (Collingwood, Victoria, TAFE Publications, 1991).

112 For a detailed analysis of current definitions, *see* National Alternative Dispute Resolution Advisory Council ('NADRAC'), *A Framework for ADR Standards* (Canberra, Commonwealth of Australia, 2001), Appendix A.

113 H. Astor and C.M. Chinkin, above n. 111, p. 82.

administrations. The aim is to address problems raised by taxpayers that threaten to escalate into a formal dispute before they do so. The structure differs, but in a typical negotiation context, the role of the relevant revenue officer charged with problem resolution is to act as a negotiator for the revenue authority to resolve a dispute with a taxpayer where the case officer directly responsible has been unable to negotiate an outcome. Officers will usually be trained for the role and may report directly to a senior officer within the revenue authority. Through negotiation they use a problem solving approach that attempts to deal with the underlying interests of the revenue officers and the taxpayers, in a way that is seldom possible in a more formal tribunal or court setting. Transaction costs of disputes (both direct costs such as advisers' fees and opportunity costs such as lost productivity) reduce as a result.

An example of negotiation as part of the ordinary tax collection process is found in tax audits and the power of the revenue authority to enter into settlements and compromises in some jurisdictions. In most countries, particularly where the introduction of self-assessment has replaced administrative assessment (in which some form of physical or automated examination of returns take place), the tax audit has become a vitally important tool of tax enforcement.[114] The aim of the tax audit process is to identify where taxpayers have failed to comply with the tax law resulting in tax deficiencies. Because of the inherent uncertainty in the interpretation and application of much of the tax law, audits often conclude with a negotiated settlement, particularly for large taxpayers.[115] The negotiation process is broad enough to cover the level of penalty applicable where there is a tax shortfall.[116]

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[114] OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches* (Paris, Centre for Tax Policy and Administration, 2006); OECD, *Strengthening Tax Audit Capabilities: Auditor Workforce Management — Survey Findings and Observations* (Paris, Centre for Tax Policy and Administration, 2006); and OECD, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2006)* (Paris, Centre for Tax Policy and Administration, 2006).

[115] Facilitated by the functional approach to tax administration, with special organisational focus on large taxpayer operations, ibid., p. 12. *See further*, Inter-American Center of Tax Administrators, *Examination Handbook — Strengthening the Examination Function in the Tax Administrations of Latin America and the Caribbean* (Washington DC, IBFD, 2003); L.J. Priestley QC, 'Commissioner's Powers of Settlement and Compromise' (2002) 12 *Revenue Law Journal*, 40; and, more generally, the disputes resolution process in New Zealand contained in the Tax Administration Act 1994, subject to significant amendment in 2004.

[116] L.J. Priestley QC, above n. 115.

Most negotiation of this type is now indirect negotiation where the parties to the dispute use representatives, usually lawyers, accountants or tax agents (where these are recognized as competent to represent a taxpayer) to negotiate an outcome.[117]

2. Conciliation

> Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach agreement.[118]

Conciliation under a statute or government service charter follows this process. It can be distinguished from mediation in that a conciliator may have an advisory role on the content of the dispute and give expert advice on likely settlement terms in the light of both content and process.[119] A mediator assists the parties in the decision-making process and attempts to improve it so that the parties can reach an outcome to which each of them can assent.[120] A mediator arguably only advises therefore on process. The term conciliation is probably

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117 NADRAC, above n. 112, p. 117.

118 Ibid., p. 116.

119 Ibid. Although L. Boulle, above n. 111, p. 111 explores the distinction and argues that this definition is applicable to evaluative mediation such that it is 'difficult to sustain a distinction in terms of the intervener's level of interventionism' (p. 112).

120 L. Boulle's definition in the 1st edition of his book, above n. 111. In his 2nd edition, ch. 1, he notes the difficulties in defining mediation and similar concerns can be raised in respect of the ADR definitions set out in this chapter. The ADR movement has developed significantly and broadly in recent years, which makes it difficult to provide a single definition that will satisfy the different schools of thought. Accordingly, the use of the NADRAC definitions in the context of an analysis of a different area of the law provides both meaning and something of a shield against criticism of that meaning. *See further,* J. Wade, 'Mediation — The Terminological Debate' (1994) 5 *Australian Dispute Resolution Journal*, 204.

more appropriate in the tax context, whatever the difficulties in distinguishing it from mediation, simply because it suggests that the process is undertaken in the context of a formal legislative or administrative framework.[121] For this reason the term conciliation is used, although it may be indistinguishable in places from mediation.

Conciliation is the intermediary step in the dispute resolution process often introduced into the tax administration, collection and enforcement process to help improve taxpayer compliance. Although normally a problem resolution unit or a trained revenue officer negotiates on behalf of the revenue authority, the process can be set up to act as conciliation between the revenue officer in charge of the case and the taxpayer. The conciliator may act as an advocate for the taxpayer within the revenue authority, presenting the taxpayers concerns. If so, the conciliator will usually present the revenue authority position in response and try to reach agreement. If it is to be a true conciliation, the conciliator will not take the part of the revenue authority, which is difficult to achieve unless the conciliator is independent.[122]

To overcome the difficulty of independence, many jurisdictions have introduced a separate office of ombudsman or adjudicator.[123] If the ombudsman/adjudicator finds that there is sufficient basis for a taxpayer's complaint, he or she may take up the issue with the revenue authority and conciliate a resolution of the problem between the revenue authority and the taxpayer. It could be argued that a threshold requirement before an ombudsman/adjudicator will consider a complaint makes it a conciliation/arbitration rather than a straight conciliation. However, once the complaint is accepted, the process is usually one of conciliation.

A process that is often called mediation or conferencing is often a successful case management component of taxation tribunals used for the first stage of tax hearing in the judicial process. The process may be provided for in the legislation, as in Australia, and a tribunal member, registrar or other

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[121] In other words, as L. Boulle, ibid., p. 115, points out, parties have to reach agreements that comply with the norms embodied in that framework, whereas in private mediations the parties 'can make decisions in terms of their own norms provided they are not acting unlawfully.'

[122] The IRS uses specially trained appeals officers, who act as a neutral party in the dispute. Customer satisfaction with the process has seen a significant broadening of the fast-track settlement processes. *See*, *e.g.*, IRS, *Fast Track Mediation: A Process for Prompt Resolution of Tax Issues*, Publication 3605 (Rev 09-2002), <www.irs.gov>, 11 November 2006.

[123] *See* the examples, above n. 105.

judicial or quasi-judicial officer will hold a preliminary meeting in an attempt to resolve disputes before a formal hearing.[124] Often the meeting is short and facilitative where the parties are represented. Where the parties are unrepresented the process can involve significant intervention that can be strongly advisory or evaluative.[125] Conferencing is particularly useful in providing taxpayers with a third party advisory view that an appeal to the tribunal has no substance. A taxpayer in dispute is much more likely to accept that he or she has no case from a member of the tribunal than from the revenue authority.

Mediation is increasingly common in the court system as an integral part of the case management programme, which could therefore also apply to tax matters.[126] Systemic mediation of this kind can vary between court appointed mediation and mediation according to its understood definition, where the parties appoint the mediator. The court will usually in this case have an approved panel of mediators chosen on the basis of their qualifications and experience.

3. Arbitration

> Arbitration is a process in which the parties to a dispute present arguments and evidence to a neutral third party (the arbitrator) who makes a determination.[127]

As noted above, in the tax context arbitration is unlikely to be private. It is a more formal arbitration set up within the framework of the dispute resolution system. This flows from the legislative imposition of taxation. Arguably, a

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124 For example, the process followed in the Australian Administrative Appeals Tribunal ('the AAT') and Small Tax Claims Tribunal.

125 *See* P. Gerber, 'Mediating Tax Appeals in the AAT' (1992) Taxation Institute of Australia, 31st Victorian Taxation Convention Papers 31 and R. Fayle and S. Chapple, 'The Impact of the Recent ARC Report on Income Taxation Dispute Resolution in the AAT', a paper presented at the ATAX conference on 'Current Issues in Tax Administration', (Sydney, Australia, 11 and 12 April 1996). The process is analysed in L. Boulle, above n. 111, p. 127. He notes that the purpose of conferencing is often focused on process rather than dispute resolution, *see* the Australian case of *Nodnara Pty Ltd v. Deputy Commissioner of Taxation*, (1997) 38 *ATR*, 527.

126 The Supreme Court Amendment Act 1995 (Qld) is an example. It provides for mandatory mediation and case appraisal in civil matters in all courts in Queensland, when ordered by the court. *See generally*, L. Boulle, above n. 111, p. 130 and p. 374, and H. Astor and C.M. Chinkin, above n. 111, p. 237.

127 NADRAC, above n. 112, p. 119.

revenue authority would breach its delegated decision-making powers if it were to transfer decision-making authority to a private third party. The same could be said for an ombudsman/adjudicator. However, as identified above, arbitration can flow from the negotiation or conciliation as part of the dispute resolution process: for example, where a revenue officer in a problem resolution unit must make a decision following a negotiation on behalf of the revenue authority or conciliation between a case officer and a taxpayer. The same can occur when an ombudsman/adjudicator considers a complaint. Beyond arbitration the tax process often uses an intermediate tribunal or low level tax court where the process is not subject to full litigation in a formal setting, but provides a determinative and enforceable framework at an informal level that has many of the characteristics of arbitration.

C. Application: developing the australian taxpayers' charter to enhance dispute resolution and voluntary compliance

Why use the Australian Taxpayers' Charter (the Charter) as a case study in dispute resolution? It was introduced in 1997 and has been updated after reviews.[128] It is a fairly standard charter of taxpayers' rights that articulates existing secondary legal rights and a mix of primary and secondary administrative rights. Its internal mechanisms for enforcement are administrative, but it contains detail of how to seek enforcement of legal rights, such as the right to appeal.[129] Nonetheless, its focus is on dealing with taxpayer concerns administratively and to provide a professional and responsive Tax Office that is fair, open and accountable in helping members of the community comply with their tax obligations cheaply and conveniently.[130] This reflects the approach of many charters of taxpayers' rights. It is not necessarily the most far reaching (the US Bills of Rights and supporting administrative documents provide a range of substantial rights for taxpayers) but it is the subject of regular review and has been recognized for its effectiveness.[131] Importantly, there is also

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[128] Australian Taxation Office, *The Taxpayers' Charter*, <www.ato.gov.au>, 1 August 2006.

[129] Ibid., p. 12.

[130] Ibid., p. 4.

[131] For example, S. James, K. Murphy, and M. Reinhart, 'The Taxpayers' Charter' (2004) 7 *Journal of Australian Taxation*, 336; M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax*

sufficient information available to make an analysis of the transformation of dispute resolution between the ATO and taxpayers. It therefore provides a credible model demonstrating the effect of change in tax administration.

Examining how the Charter provides avenues for taxpayers to exercise their administrative rights is a useful starting point for the application of basic ADR theory. Enforcement activity flows from conflict between the taxpayer and the revenue authority. Historically, the ATO model of dispute resolution was not designed to reduce conflict escalation and the Charter model represented the implementation of a change in culture and approach that had developed over a number of years. It involves negotiation, conciliation, arbitration and a mixture of these processes. Understanding Charter processes can be done more easily within the context of a model of social conflict. This understanding is important to determine which processes are most appropriate to support taxpayers' administrative rights.

1. The social conflict model

One of the leading models of conflict is that put forward by Pruitt and Kim in *Social Conflict: Escalation, Stalemate and Settlement*[132] (the Social Conflict model). This can be applied to contrast the framework for the ATO/taxpayer relationship, which existed before and after the introduction of the Charter. The regulation of conflict under the Charter increases the opportunity to resolve conflict before it escalates. In contrast, an examination of the position prior to the Charter shows how there was a high risk of some escalation. The model offers only one perspective, but it does provide a means to review the mechanisms to regulate conflict available under the Charter and their effectiveness.

The Social Conflict model defines conflict as a '*perceived divergence of interest*, a belief that the parties' current aspirations are incompatible'.[133] The Social Conflict model suggests that parties pursue one of four main strategies to settle conflict. They contend and try to impose their preferred solution on the other party; they yield and settle for less than they would have liked; they

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Review 22, 44; and M. D'Ascenzo in his 'Commissioner's online updates', 28 July 2006, <www.ato.gov.au>, 1 August 2006.

132 D.G. Pruitt and S.H. Kim, *Social Conflict: Escalation, Stalemate and Settlement* (3rd edn., New York, McGraw Hill, 2004).

133 Ibid., p. 7.

problem solve and try to find a solution that satisfies the interests of both sides; or they avoid and do not engage in the conflict either through inaction or withdrawal.[134] Taxpayers and their advisers recognize all four strategies from their dealings with the ATO. The strategy chosen often depends upon the ATO personnel involved.

2. Conflict escalation before the charter

Before the introduction of the Charter, assume that a taxpayer company believes that its rights have been breached. The ATO has given a ruling that the taxpayer believes is inconsistent with a ruling given to another company in the same industry on similar facts. Assume that the ruling relates to the exercise of the Commissioner's discretion and that, prima facie, there is no question of improper exercise of the discretion. Following an adverse decision by the Commissioner on an initial objection to the ruling, there is little point pursuing the matter in the Administrative Appeals Tribunal or the courts, as the ruling relating to the taxpayer is a reasonable exercise of the Commissioner's discretion in this instance. When the ATO position is first contested by the company, the initial strategy on both sides is probably to 'contend', and to attempt to impose their preferred solution on the other side. The company is usually represented by a tax adviser acting for and on behalf of the company. 'Contending' takes place through letters with supporting documentation, with references to the law and cases. There is also generally contact between the taxpayer's adviser and the ATO, by telephone and, sometimes, at meetings.

Escalation[135] of the conflict follows. There is the overriding threat in the hands of the ATO that, if the taxpayer does not comply with the ruling, it will suffer interest and penalties on any tax unpaid. The issues discussed in the negotiation proliferate so that any even slightly relevant argument is brought in to assist or refute the taxpayer's case. The parties become increasingly involved in the negotiation over the ruling and commit additional resources to reinforce their views. For example, a barrister's opinion may be sought by both sides in support of their arguments. The outlook of each party is individualistic: the taxpayer wants to apply the law in a particular way to the relevant transaction, while the ATO wants to apply the ruling it has given and protect

134 Ibid., p. 5 *et seq*.

135 The discussion is based on the model of escalation and its development in D.G. Pruitt and S.H. Kim, above n. 132, ch. 5 and 6.

the revenue base. If the issue is significant enough, the taxpayer may try and enjoin the support of other parties, such as taxpayer representative groups.

Underlying the conflict is the different focus by the parties on their interests, rights and power.[136] 'Interests' 'refer to the underlying needs and concerns of parties in dispute'.[137] 'Rights' refer to norms, such as statutes, court decisions and ATO rulings. Rights are 'objective standards which can be imposed on parties in dispute in a neutral and even-handed way'.[138] In a tax dispute the individual interests tend to be subsumed in the argument over legal rights. It is usually only when the parties enter into a form of problem-solving in an effort to resolve the conflict that interests are taken into account. Problem-solving is discussed below. However, even though tax disputes are overtly focused on the rights of each party, an important factor in any dispute with the ATO is the cost of taking the matter further. Where the costs are too high the ATO becomes the effective arbiter of both parties' rights, as the taxpayer has to withdraw.[139] Immediately, the ATO's power to impose tax, interest and penalties on the taxpayer, or the threat to do so, becomes a further factor that influences the outcome of the dispute.[140] A counter-weight to the ATO's power is where the matter is of public interest and taxpayer representative groups assist the taxpayer to obtain an adjudication of the rights in the courts.[141]

3. Settlement and the problem of escalation

The ATO and taxpayers conduct their disputes within a relatively formal framework, which limits the extent of escalation.[142] Conflicts are usually

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136 A useful discussion of these issues, from which many of the points made here are drawn, can be found in W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, ch. 1.

137 L. Boulle, 'Rights and Interests — Refining the Justice Debate' [1996] 3 *Dispute Resolution Bulletin*, 35.

138 Ibid.

139 D.G. Pruitt and S.H. Kim, above n. 132, p. 6.

140 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 7. *See further*, the discussion in L. Boulle, above n. 111; H. Astor and C.M. Chinkin, above n. 111; and P. Condliffe, above n. 111.

141 On this aspect of ADR, *see* H.T. Edwards, 'Alternative Dispute Resolution: Panacea or Anathema?' (1986) 99 *Harvard Law Review*, 668.

142 Contrast this with commercial and private conflict where escalation has become a significant problem, leading to extensive research on litigation risk management. Although not directly relevant to conflict escalation in the tax context, clearly the

settled. However, resolving a conflict does not necessarily overcome the problem of escalation. Conflict affects the total relationship between the parties. Even if a particular problem 'is resolved, the underlying conflicts are not, so the cycle of confrontation . . . continues'.[143]

This might happen in the above example of the company in a number of ways. The ATO may send a final communication restating its opinion. The company would not be happy with this outcome but, in the absence of any basis for appeal, it would have to accept that it had been overwhelmed by the ATO action. The company itself might no longer wish to pursue the particular conflict and may yield to the ruling by the ATO. The ATO may yield to the arguments of the company and alter its ruling to reflect the favourable ruling given to the other company. Sometimes, the escalation will reach a stalemate and the two parties will try and reach agreement through the use of various tactics. Stalemates involving a powerful organisation such as the ATO seldom occur, unless the ATO permits it. This is discussed further below.

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environment in which the resolution of conflicts over tax matters takes place is influenced by the broader community expectations about how conflict should be dealt with. Where conflicts are not dealt with in accordance with those expectations the community response is likely to be increasingly less forgiving and lead to escalation. What we are seeing is the development of social norms governing conflict management that will inevitably impact on administration of government, including taxation. For recent thinking on conflict management in a range of loosely analogous areas *see*, *e.g.*: in media law, K. Podlass, 'Broadcast Litigiousness: Syndi-Court's Construction of Legal Consciousness' 23 *Cardozo Arts and Entertainment Law Journal* (2005) 465; in labour law, M.Z. Green, 'Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?' 26 (2005) *Berkeley Journal of Employment and Labour Law*, 323; and in commercial law, L.B. Bingham, 'Control Over Dispute-System Design and Mandatory Commercial Arbitration' 67 (2004) *Law and Contemporary Problems*, 221. J. Lande, in 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' 50 (2002-2003) *University of California Los Angeles Law Review*, 69 explores the development of rules and norms in formal mediation programs, illustrating the sophistication of some communities in taking advantage of formal conflict resolution mechanisms. The point is that for a revenue authority simply to offer a conflict resolution mechanism to taxpayers will soon turn to expectation not only that there is such a mechanism but that it will operate in ways influenced by other conflict resolution mechanisms with which taxpayers are familiar. It may amount to 'opening the floodgates' but in doing so it will build a stronger relationship between taxpayers and revenue authorities that will, based on the evidence presented in Chapter 2, improve compliance.

[143] W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xiii.

In the example, the company does not appeal to the courts, preferring to negotiate with the ATO. The transaction costs of escalation to the level of court action become unacceptable to the taxpayer. The time, energy and effort involved in conflict can disrupt ordinary working practices, to the extent that it becomes counterproductive. The monetary costs can also quickly outweigh the benefits of continuing the conflict.[144]

4. The effect of conflict escalation on taxpayers

The above scenario is common to dispute resolution involving revenue authorities. Conflict resolution that is rights-based (where the outcome is determined according to rights such as legal standards) and power-based (where the outcome is determined according to who is more powerful), favours the revenue authority. Such situations usually constitute a 'bad' experience for the taxpayer. As in most jurisdictions, in Australia taxpayers are in constant contact with the ATO. Companies and other entities, in particular, can have several different tax returns to self assess, as well as numerous other contacts with the ATO during the tax year. A conflict in one area can spill over into the other areas in the way returns are completed and contacts are made. The conflict can move from an individual desire to achieve an end in one area to a desire to beat the ATO at its own game in all areas of tax compliance.[145]

A taxpayer that sees the ATO as the aggressor uses defensive tactics. In response, the ATO is likely to perceive the taxpayer as a high compliance risk and take further action.[146] The conflict spiral develops, each seeing the other's behaviour as illegitimate. Personal antipathy can occur even in dealings with the ATO as an organisation. The taxpayer's file will reflect the detrimental labelling of the taxpayer by all those officers who have had contact with the taxpayer and this view will be adopted by anyone within the ATO picking up the file.[147] The resolution of individual disputes may only exacerbate conflict over the whole gamut of the taxpayer's relations with the ATO.

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144 *See further, e.g.*, O.E. Williamson, 'Transaction Cost Economics: The Governance of Contractual Relations' (1979) 22 *Journal of Law and Economics*, 233.

145 D.G. Pruitt and S.H. Kim, above n. 132, ch. 5 and 6.

146 The ATO compliance strategies focus on risk assessment, *see*, *e.g.*, ATO *Compliance Program 2006-07*, <www.ato.gov.au>, 1 November 2006.

147 Social identity theory supports this attribution of individual hostility (individual officers) to the group (the ATO) on the basis that the self-respect of the members of the group is based on believing that their group is better than the other group (the taxpayer). *See* D.G. Pruitt and S.H. Kim, above n. 132, p. 133.

Conflict escalation can be seen both on the individual level and on a group level, between taxpayers as a whole and the ATO. It has led to significant tax avoidance in Australia. Particularly during the 1970s and 1980s and often with the encouragement of the courts, taxpayers tried to expand the boundaries of legitimate tax avoidance.[148] Governments responded with increasingly all- nm encompassing legislation to minimize the opportunity for any unintended revenue leakage and to support ATO administration, collection and enforcement.

Specifically, conflict escalation occurred as the ATO began an aggressive audit programme to enforce taxpayer compliance. If a taxpayer was found to have erred in self assessing, penalties and interest were applied. In retaliation, taxpayers began to litigate and adopt a more aggressive approach towards the ATO.[149] There were structural changes on both sides that contributed to increases in the cost of compliance.[150] Simultaneously, associated psychological changes reinforced the conflict spiral.[151]

Negative perceptions and attitudes formed. Differences between the ATO and taxpayers were emphasised by the ATO, taxpayer groups and the press. The ATO was often represented as aggressive and hostile; taxpayers as trying to beat the system. A lack of trust and a tendency to feel threatened by the other party assisted the escalation. Yet in broad terms, taxpayers simply wanted to be able to succeed in work or business, and the ATO wanted to collect the right amount of revenue. Decreased respect and poor communications tended to lead to confrontation rather than problem-solving, exacerbated by de-humanising the other side.[152] The result was: group polarisation; a tendency to prefer conflict in audit and other areas of dissent to problem solving; group cohesiveness on both sides; each side aiming to achieve its goals regardless of the effect on the other party; and the emergence of militant

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148 For a discussion of this point, *see* J. Cleary, 'The Evolution of Tax Avoidance' (1995) 5 *Revenue Law Journal*, 219.

149 *See* the classic escalation pattern described in *FCT v. Citibank*, (1989) 20 FCR 403.

150 Described in J. Pope, 'Compliance Costs of Taxation: Policy Implications' (1994) 11 *Australian Tax Forum*, 85.

151 This section is based on the model in D.G. Pruitt and S.H. Kim, above n. 132, ch. 6.

152 This tendency could be seen in parts of the ATO after the introduction of the Charter. The Taxation Ombudsman highlighted examples in the debt collection area in his 1996 report. *See* D. Evans, 'Hard Cases' (1995-1996) 30 *Taxation in Australia*, 236. *See further*, D.G. Pruitt and S.H. Kim, above n. 132, ch. 2.

leaders and subgroups.[153] Taxpayer representative groups became more cohesive, focused and aggressive under strong leadership, in response to similar developments in the ATO.

5. Achieving taxpayer compliance: reducing conflict escalation

The ATO goal was clear: it wanted to improve taxpayer compliance.[154] It became involved in extensive research to identify the best methods of achieving its goal.[155] It accepted the incentives to introduce taxpayers' rights outlined in Chapter 2 and sought co-operative engagement with taxpayers to improve compliance. A radical change in approach emerged. The papers at the first ATO Compliance Research Conference, held in Canberra in 1993, are telling. They include titles such as:[156] 'Helping tax agents help taxpayers', 'Changing taxpayer compliance: the impact of business auditors as service providers' and 'Taxpayers are people'. The papers reflected an attempt to increase the legitimacy of the ATO in the eyes of taxpayers and to reduce significantly taxpayers' bad experiences with the tax system (and therefore conflict escalation).[157]

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153 *See further*, W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xi.

154 Seen in the Commissioner's annual reports, e.g., Commissioner of Taxation, *1994-95 Annual Report* (1995 AGPS). *See also*, J. Wickerson, 'The Changing Role of Taxpayer Audit Programs: Some Recent Developments in the Australian Tax Office' (1994) 4 *Revenue Law Journal*, 125, and A. Wirth, 'Changing Taxpayer Compliance: The Impact of Business Auditors as Service Providers' (1994) 11 *Australian Tax Forum*, 63.

155 Ibid.

156 Presented by S. Bird, A. Wirth and R. Anderson, respectively, all of the ATO.

157 Following the international research discussed in Chapter 2. In particular, on tax audits, *see* K.A. Kinsey, *Effects of IRS Enforcement: An Analysis of Survey Data* (Washington DC, American Bar Foundation, 1990) and L. Stalans, 'Talking about Tax Audit Experiences: The Procedural Content of Socialisation', paper presented at the Internal Revenue Service Research Conference, Washington DC, 12-13 November 1992, quoted in J. Wickerson, 'Measuring Taxpayer Compliance: Issues and Challenges Facing Tax Administrations' (1994) 11 *Australian Tax Forum*, 1. Evidence for Stalans' conclusions can be seen in the attitude of Congress to the United States Internal Revenue Service, when passing the Taxpayers Bills of Rights 1 and 2. *See* A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in D. Bentley, above n. 15, ch. 15.

This type of harsh experience is called relative deprivation. It alerts the deprived party to the existence of incompatible interests and at the same time provides the energy to combat that threat. Contentious action by the taxpayer is more likely where there is a growing distrust of the ATO.[158] The Dual Concern Model of Conflict Theory states that conflict style is determined by the strength of each party's interest in two independent variables: their concern about their own outcomes and their concern about the other party's outcomes. Where there is high concern about both outcomes, problem solving is more likely.[159] The ATO's research led it to realize the importance of having a high concern for taxpayer interests so that it could achieve its own goals of increased taxpayer compliance and reduced conflict escalation. This dependence emphasises the instrumental nature of the ATO's concern: satisfaction of taxpayers is instrumental in the ATO increasing taxpayer compliance.[160]

D. The charter framework

The Charter was introduced as a direct result of this change in ATO approach to compliance.[161] Its framework for conflict resolution provides a different approach, has developed over time and builds on positive past experience. Ury, Brett and Goldberg state that 'disputes are inevitable when people with different interests deal with each other regularly. Those different interests will come into conflict from time to time, generating disputes.'[162] Importantly, the Charter does provide a framework to regulate and resolve the conflict between the ATO and taxpayers, focusing on early negotiation and conciliation rather than moving too quickly to arbitration.

The Charter articulates the possibility of conflict over rights and the validity of taxpayer concerns. It provides conflict regulating mechanisms.[163] For example, if a taxpayer company has not received a proper explanation for

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158 D.G. Pruitt and S.H. Kim, above n. 132, p. 19.

159 Ibid., ch. 3.

160 Ibid., p. 45 *et seq*.

161 Flowing from the implementation of Recommendation 131 of the Report of the Joint Committee of Public Accounts *Report 326, An Assessment of Tax* (1993), it was effective from 1 July 1997.

162 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xii.

163 Providing mechanisms is not sufficient in itself, as will be discussed below. Per W.L. Ury, J.M. Brett and S.B. Goldberg, ibid., 'the challenge is to develop procedures that the parties will use ... to resolve disputes more satisfactorily and at lower cost'.

an ATO decision, the Charter recognizes that an explanation should be given and provides the taxpayer with a formal avenue for complaint. Where previously taxpayers relied on individual approaches to the ATO, there are now formal mechanisms to initiate a complaint resolution process.[164]

However, before exploring those mechanisms, it is important to note that the Charter is limited to specific areas. It is not all embracing. For example, the history of conflict in the area of taxpayer rights extends to rights not included in the Charter, such as the right to certainty. That does not mean that there is no conflict over the right. In other words the Social Conflict model developed in the Charter is only as effective as its scope.

The Charter does articulate the rights of taxpayers, thereby providing a focus for resolution of conflicts in the area. However, the corollary is that the Charter will also tend to incorporate elements of conflicts that go beyond its scope. Where the Charter is limited in its scope, a conflict, say on a tax audit, may cover a much broader range of issues. Conflicts tend to shape themselves to fit within the process available. This leads to greater satisfaction where the conflicts are resolved, but there is a danger that those aspects of the conflict that could not fit within the available mechanisms will leave unresolved grievances to fuel further conflicts.[165]

For example, on a tax audit, if taxpayers try to restrict the resolution of issues to the Charter's dispute resolution process, they will necessarily be disappointed. The rights protected in the Charter are limited to process and cannot deal effectively with matters of substance relating to the operation of the law. 'Process' means procedural issues, such as the giving of reasons for a decision, whereas, 'substance' means matters of law, such as whether expenditure is deductible. The temptation is to try and force issues of substance into the Charter process, because it is so much cheaper and more accessible than the court system.

Even with these caveats, the Charter resolution process provides a useful framework.[166] To understand it better, it is useful to provide some analysis of its design. To do that it is first important to explore recent history of ATO dispute system design as that forms the foundation for that used for the Charter.

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164 These are clearly articulated in the ATO, *Taxpayers' Charter Explanatory Booklet 08: If you're Not Satisfied* (ATO, 2003), <www.ato.gov.au>, 1 August 2006.

165 These concepts are considered in R.E. Miller and A. Sarat, 'Grievances, Claims and Disputes: Assessing the Adversary Culture' (1980-1981) 15 *Law and Society Review*, 525.

166 Taxpayers and other stakeholders report a high level of satisfaction with most aspects of the operation of the Charter. *See*, TNS Consultants, *Review of the Taxpayers' Charter 2005* (TNS Social Research, 2006), <www.ato.gov.au>, 1 August 2006.

1. A problem-solving approach to contain escalation

When the ATO decided that to help improve compliance it should improve its relationship with taxpayers, the ATO used typical conflict de-escalation tactics.[167] This took place at two levels. At the community level, it increased formalised interaction and communication through a range of consultative committees, at all levels of the ATO, to try and facilitate community and stakeholder participation in the tax administration process.[168] The ATO also tried to institute a cultural change to make it seem more human and began to call taxpayers 'clients' and tax administration 'service'.[169] At the individual taxpayer level, Problem Resolution Units (PRUs) were set up to deal with common complaints within each office.

The ATO felt that the results showed the effectiveness of this problem solving approach. There appeared to be a significant increase in compliance and a marked change in attitude by the community towards the ATO.[170] It culminated in a 'team approach', involving taxpayer groups and the ATO, trialled in the Tax Law Improvement Project, which was a project undertaken in the 1990s aimed at simplifying the tax legislation. Taxpayers were encouraged to participate at all levels of the process and on occasion were the staunchest defenders of the finished elements of the product.[171] The project was not completed, but the inclusion of taxpayers in rulings panels and other projects

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Similar surveys are conducted in many revenue authorities. *See, e.g.*, *National Taxpayer Advocate's 2007 Objectives Report to Congress: Appendices*, 30 June 2006, <www.irs.gov/advocate/>, 1 August 2006.

167 D.G. Pruitt and S.H. Kim, above n. 132, ch. 9.

168 This has increased substantially over time and some idea of the breadth of stakeholder input today can be gained from the ATO homepage under 'Stakeholder consultation', <www.ato.gov.au>, 1 August 2006.

169 This is not unique to Australia. Similar measures have been taken in Canada by Revenue Canada. *See* J. Li, above n. 15. However, this approach is a feature of highly developed tax systems. *See* OECD, above n. 114. Compare this with the system in Hungary, which is an example of a tax administration making the transition from a closed Communist system. It has moved to self-assessment, but as yet has no form of independent review, nor any independent documents outlining taxpayer rights. For a discussion of the Hungarian tax administration system, *see* D. Deak, 'Taxpayer Rights and Obligations: The Hungarian Experience' in D. Bentley, above n. 15, ch. 8.

170 Above n. 154.

171 As seen in the address by the private sector representatives on the Tax Law Improvement Project to the 1996 Australasian Tax Teachers' Conference, in relation to the reformulation of the loss provisions.

has continued.[172] By this means, the ATO has in some areas effectively used common group membership to break down group-centric approaches and de-escalate conflict.[173]

At the individual level, PRUs were introduced as an alternative to the more formal framework previously used, allowing for more negotiation and conciliation early on in the conflict. Conflict limiting institutions are 'forums and third party services for helping their *members resolve* conflict peacefully. Such institutions contribute to stability' in the community.[174] As described in the initial example, the formality that existed in the ATO relationship with the taxpayer could limit the particular conflict but it did not necessarily resolve it. If there was escalation, the AAT and the courts act as conflict limiting institutions in that they 'resolve' conflict. However, the adversarial nature of the court system means that the parties are polarised into contending rather than problem solving, unless conciliation/arbitration at the AAT level is accepted and is successful.

The ATO has recognized that the adversarial approach does not help to maintain a relationship of trust and mutual benefit with the taxpayer that will in turn encourage compliance. Furthermore, it is aware that the rights in the Charter relate mainly to process and are therefore seen as falling squarely within the jurisdiction of the ATO.[175] It knows that from a taxpayer perspective the ATO is seen as being in a position of power that should allow it to resolve any process issues. Taxpayers are unlikely to accept that it is the law itself, which prevents the ATO from looking after taxpayers' interests.[176]

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172 The ATO undertakes extensive liaison and consultation with taxpayer representative groups: ATO, above n. 166. In response to systemic concerns with the tax system, the Inspector-General of Taxation was established in 2003 under the Inspector-General of Taxation Act 2003 (Cth) as an independent statutory officer to improve tax administration, provide independent advice to government on the administration of tax laws and to identify systemic tax issues. The ATO has established its own internal Integrity Advisor, to monitor how the ATO is viewed in the community and to ensure that ATO staff adheres to Charter principles: *see, e.g.*, TNS, above n. 166, p. 47.

173 D.G. Pruitt and S.H. Kim, above n. 132, p. 134 *et seq*.

174 Ibid., p. 138.

175 Evidenced by the consistent review of Charter effectiveness across all areas of its operation. *See, e.g.*, TNS, above n. 166.

176 Discussed when the Charter was introduced by the then Commissioner of Taxation, M. Carmody, 'Taxpayers' Charter: ATO Perspective', paper presented at the ATAX Conference on Current Issues in Tax Administration (11-12 April 1996),

Both taxpayers and the ATO want to reduce the overall cost of disputes.[177] Costs include the actual compliance costs, such as advisers' fees and direct wages, and also indirect costs, such as lost wages, opportunity costs of those involved in the compliance process and physical and emotional stress.[178]

Experience of the PRU model provided a basis for the complaint handling process under the Charter as ATO Complaints.[179] Importantly, the model has ATO Complaints officers as review officers within the ATO to case manage a complaint to resolution. They use a problem solving approach in working with the business area of the ATO to achieve resolution. This allows a focus on the underlying interests of the parties concerned, in a way that is seldom possible in a more formal tribunal or court arbitration. It is an issue that ATO Complaints officers are ATO employees and are not always seen as neutral and impartial.[180] However, while complete neutrality and impartiality may not be

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p. 7. Reinforced by the current Commissioner, M. D'Ascenzo in his 'Commissioner's online updates', above n. 131: 'When we ask someone about their experience with the Tax Office, a few of the words I'd like to hear are: professional, honest, courteous, reasonable, trustworthy, transparent, open and accountable.'

177 Ibid. *See also*, W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. xi.

178 The hidden costs of unresolved conflict are now well documented and have encouraged the establishment of alternative dispute resolution systems in a wide range of organisations and institutions. *See, e.g*., H. Astor and C.M. Chinkin, above n. 111, p. 55 *et seq.*; L. Boulle, above n. 111, p. 70 *et seq.*; and M.P. Rowe, 'The Corporate Ombudsman: An Overview and Analysis' (1987) 3 *Negotiation Journal*, 127. It is the classic transaction cost argument. For a detailed discussion, *see* R. Coase, 'The Problem of Social Cost' (1960) *Journal of Law and Economics*, 1, and R.A. Posner, *The Economics of Justice* (Cambridge MA, Harvard University Press, 1983).

179 The author is most grateful to Carol Pimentel, Manager, ATO Complaints Support, for providing a comprehensive response to a request for current ATO practice, which forms the factual basis for this section. The interpretation and any errors are the author's.

180 NADRAC, above n. 112, p. 98 and p. 114, notes that neutrality relates to questions of interest and impartiality to behaviour:

> Neutrality is a relative quality that reflects the demands of the context, suggests certain conduct on the part of the practitioner and creates expectations of impartial behaviour. NADRAC acknowledges that absolute neutrality is impossible, since any practitioner has a degree of interest in the outcome of the dispute.

possible, particularly if acknowledged, they are not a bar to effective third party conciliation.[181]

Escalation beyond ATO Complaints introduces conciliation/arbitration with a complaint to the Special Tax Adviser to the Commonwealth Ombudsman (the Taxation Ombudsman). The Taxation Ombudsman is integral to the ATO complaints handling procedures and acts as a final avenue of conciliation/arbitration where the internal procedures fail. The process is discussed in detail below. A similar approach is taken by the Privacy Commissioner, to whom taxpayers may complain, if they believe that the ATO has breached the Privacy Act in dealing with their personal information. The use of the Taxation Ombudsman and Privacy Commissioner gives people an informal and face-saving way to resolve their disputes. Research suggests that the mere presence of a third party is likely to change the interactions between the parties and can be very beneficial in producing a settlement of the conflict.[182]

In the event that a taxpayer wishes to move directly to a determinative process involving formal adjudication/litigation, the standard avenues of appeal against a decision of the ATO are available. These include a review by the Administrative Appeals Tribunal (AAT), which also hears small tax claims in its Small Tax Claims Tribunal (STCT),[183] and the Federal Court of Australia. Tribunals sit as though they were the original decision maker with all the relevant powers.[184] When reviewing decisions they therefore review the merits of the decision. The Federal Court hears appeals directly against objection decisions made by the Commissioner and also on appeal from the AAT.

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181 D.G. Pruitt and S.H. Kim, above n. 132, ch. 11. Although, it is interesting to note that the United States' Taxpayer Bill of Rights 2 (HR 2337), enacted on 30 July 1996, introduced an independent position of Taxpayer Advocate, within the Internal Revenue Service (IRS), to replace the existing Office of Taxpayer Ombudsman (also within the IRS), whose independence was felt to be inadequate. Section 101 established the position in order to: assist taxpayers in resolving problems with the IRS; identify areas where taxpayers have problems in dealings with the IRS; propose changes in the administrative practices of the IRS that will mitigate those problems; and identify potential legislative changes that may mitigate those problems. The Taxpayer Advocate reports directly to Congress twice a year, bypassing all other offices that were thought potentially to have compromised the independence and effectiveness of the Taxpayer Ombudsman.

182 D.G. Pruitt and S.H. Kim, above n. 132, ch. 11.

183 Administrative Appeals Tribunal Act 1975 (Cth), Part IIIAA.

184 Administrative Appeals Tribunal Act 1975 (Cth), s. 43.

The Court can make any order on the objection decision including confirming or varying the decision, or remitting the decision back to the decision maker.[185] The importance of a right of appeal and review is discussed in more detail in Chapter 8. Suffice to say that there is, within the Charter dispute resolution process, scope for moving some decisions outside alternative dispute resolution to a more formal process of review involving litigation.

2. Design of the charter dispute resolution system

In general terms, ADR theorists begin the design of dispute resolution systems by analysing the existing systems, identifying any problems that need correction and determining why those problems exist so that they are not repeated in any replacement system.[186] They attempt to incorporate problem-solving principles into the design of the system and to limit escalation.[187] This approach is common to revenue authorities and tax design consultants and provides a basis for analysing enforcement mechanisms used in tax administration.[188]

As a design principle consistent with the issues identified in the Social Conflict model, ADR theorists tend to focus on interest-based systems and look to deal with the underlying interests of the parties concerned in the resolution of disputes. They try to create 'a dispute resolution system . . . designed to reduce the costs of handling disputes and to produce more satisfying and

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185 For example, Taxation Administration Act 1953 (Cth), s. 14ZZP.

186 Identified by S. James, K. Murphy and M. Reinhart, above n. 131, p. 15 as critical to the success of the Charter. *See generally*, B. Wolski, *The Laws of Australia: Dispute Resolution* (Sydney, Law Book Company Ltd, 1997), ch. 3; W.L. Ury, J.M. Brett and S.B. Goldberg, above, n. 110, ch. 2; and C.A. Costantino and C. Sickles Merchant, *Designing Conflict Management Systems* (San Francisco, CA, Jossey-Bass, 1996), p. 69 *et seq*.

187 The design of a dispute system within the tax framework focuses on collaboration and resort to a higher authority. The options of avoidance and unilateral power play, identified as alternative options by K.A. Slaikeu and R.H. Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organization* (San Francisco, CA, Jossey-Bass, 1998), ch. 2, are less relevant in tax disputes.

188 For example, *see* C.E. McLure Jr and S. Pardo R, 'Improving the Administration of the Colombian Income Tax 1986-88' in R.M. Bird and M. Casenegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington DC, IMF, 1992), p. 124.

durable resolutions'.[189] This is also consistent with the compliance model discussed in Chapter 2.

One of the most influential models of dispute system design is that of Ury, Brett and Goldberg.[190] It provides a useful starting point to analyse appropriate measures to protect administrative rights. Ury, Brett and Goldberg put forward six principles, which can be paraphrased as follows:[191]

1. Prevent unnecessary conflict through notification, consultation and feedback.
   - A party taking action likely to affect others should notify and consult them first. Points of difference can be identified and dealt with early, to prevent potential conflict.
   - Within the limits of confidentiality requirements, the system should allow for analysis and feedback after disputes, by an ombudsman, mediator or the parties, to overcome systemic problems.
2. Create ways of reconciling the interests of those in dispute.
   - Put clear procedures in place that are easy to follow and allow the quick resolution of differences.
   - Use multiple steps in the negotiating process, so that the progression to a full-blown dispute is slowed.
   - Motivate people to use the system by making multiple entry points, preventing retaliation and ensuring that there is active encouragement to use the system.
   - Ensure that there are people the disputants can turn to for help, such as a mediator, and make certain that these people are adequately trained in the appropriate skills.
3. Build in 'loop-backs' to negotiation.
   - Where interest-based procedures do not resolve the dispute and it becomes a rights-based or power-based dispute, loop-backs allow the disputants 'time-out' to re-assess their position before it becomes too entrenched. Loop-backs encourage a return to negotiation.

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189 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 43.

190 Ibid.

191 Ibid., ch. 3. Principle 1 was principle 4 in their earlier work. This model is widely used in dispute systems design. It is analysed in C.A. Costantino and C. Sickles Merchant, above n. 186, p. 46. A similar approach is found in K.A. Slaikeu and R.H. Hasson, above n. 187, p. 29, 'The Collaboration Option' and *see* ch. 5, 'The Preferred Path for Cost Control'.

4. Provide low-cost alternatives where negotiation fails.
   – If interest-based negotiation breaks down then there should be low-cost alternatives to a full court hearing.
5. Create sequential procedures moving from low-cost to high-cost.
   – Provide clear alternatives to high-cost litigation early on in a dispute. This involves arranging the procedures outlined in points 1 to 4 in low-to-high cost sequence. For example, negotiation would be followed by conciliation and conciliation by arbitration.
6. Provide the necessary motivation, skills and resources to allow the system to work.
   – Specific motivation and training programmes must be put in place and adequately sustained to maintain a properly working system.

E. The charter model

The Charter model was developed to ensure consistency with the ATO Best Practice for Continuous Improvement and the Australian Standard on complaints handling.[192] It is a mix between a complaint handling system and a dispute resolution system. From the perspective of a complaints handling system, it also meets, to the extent it is relevant, the principles of ISO 10002:2004, the International Organization for Standardization *Quality management — Customer satisfaction — Guidelines for complaints handling in organizations*, which identifies guiding principles that include:[193]

– Visibility — publication of where and how to complain;
– Accessibility — ease of use of the system implemented;

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[192] Standards Australia Committee on Complaints Handling, *Australian Standard: Complaints handling* (Australian Standard 4269-1995) (Standards Australia, 1995). This was the first national standard to set agreed benchmarks and has since been followed by International Standard ISO 1002:2004. In 1997 the Commonwealth Government announced that it would introduce service charters in all Commonwealth Government agencies providing direct services to the public. *See* NADRAC, above n. 112, p. 51. This has ensured consistent standards across administrative charters.

[193] Available at <www.iso.org>, 1 August 2006. For a useful summary and a comparison with AS 4269, *see* the presentation by T. Sourdin, *Complaints — Complying with the International Standard*, <www.fics.asn.au>, 1 August 2006.

- Responsiveness — complaints dealt with quickly and effectively, keeping the complainant informed of progress and the outcome;
- Fairness and objectivity — the system should be equitable, objective and unbiased;
- Complaints can be made free of charge;
- Confidentiality;
- Customer-focused including opportunity for feedback and a commitment to resolving complaints;
- Accountability — clear reporting framework and transparency; and
- Continuous improvement

The review of the Charter in 2005 focused primarily on these principles and there is a clear commitment to them by the ATO.[194] The Charter's rationale goes beyond this, however, to encompass dispute resolution under self assessment to encourage voluntary compliance. It was articulated by the then Commissioner of Taxation:[195]

> For our part, we see the Charter as a natural progression along the path the ATO has been heading for several years now. This has involved an increased focus on clients whereby we look to better understand and address the issues impacting on compliance and compliance costs, an emphasis on voluntary compliance under a self-assessment system, being more open and accessible, and an emphasis in working with the community to get its support for the very important role we perform.

The Charter dispute resolution process is set out in an Explanatory Booklet to the Charter, *If you're not satisfied*.[196] This and the other booklets supporting the Charter provide a clear and comprehensive explanation of the complaints processes. The Charter is referred to in most ATO literature and on its website. The internet has ensured that the ability of the ATO to interact with taxpayers has expanded significantly. In common with most jurisdictions, electronic filing of returns and information is becoming the normal means of

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194 TNS, above n. 166. *See also* M. D'Ascenzo, above n. 131.

195 M. Carmody, above n. 176, p. 7.

196 Above n. 164. However, much of the detail in this section goes beyond the Booklet descriptions and is taken directly from email discussion with Carol Pimentel, Manager, ATO Complaints Support, above n. 179 (on file with the author). Without Ms Pimentel's contribution, this section could not have been written. Any conclusions drawn or descriptive errors are the responsibility of the author.

communication. Complaints can still be made by telephone, letter and facsimile, but are increasingly made by email and via the website.

The aim of the ATO complaints process is for taxpayers to raise any complaint in the first instance with the relevant ATO contact officer. Where there is no specific contact officer, generic emails and telephone complaints to the dedicated complaints call centre team are recorded onto a single office-wide ATO database. These are then directed electronically to the relevant business line for resolution.

The ATO is organized into lines, which focus on a type of taxpayer, a type of tax, or an aspect of internal support.[197] Each of the lines deals with taxpayers in its area on a day-to-day basis. It is a philosophy of the ATO complaints process that it is the area dealing with the taxpayer that should take responsibility for complaints. They should be encouraged to address the complaint and take any remedial action. Where a complaint is made, the relevant contact officer should deal with it in the first instance. The ATO has also established a network of 'complaint resolvers' within each of its lines. Where a complaint is not made directly to the relevant ATO contact officer the 'complaint resolver' will initiate contact with the taxpayer. The service standard requires that complainants will be contacted within three working days of the ATO receiving the complaint.[198]

If the ATO contact officer fails to resolve the complaint, it is referred to the contact officer's manager. If they cannot resolve it, it can be escalated to ATO Complaints. Where this occurs a case manager is appointed to take the matter to resolution to the extent that this is possible. The Complaints officer acts as an independent reviewer within the ATO and takes a problem-based approach to resolving the dispute.

Assume that Ms Jones, the financial controller of a taxpayer company, wishes to complain under the Charter about treatment that officers of the company received during a tax audit. She has already raised the matter with the ATO officer in charge of the audit without success.

- Ms Jones may contact the ATO officer's manager, who will attempt to resolve her complaint.
- If Ms Jones is dissatisfied with the outcome, she may contact a member of ATO Complaints and advise that she wishes to complain.

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197 *See* the organisational structure of the ATO, <www.ato.gov.au>, 1 August 2006.

198 ATO, *Taxpayers' Charter Explanatory Booklet 03: Our service standards* (ATO, 2003), <www.ato.gov.au>, 1 August 2006.

– ATO Complaints will allocate a case manager to work with the relevant business line to resolve the matter.
– The case manager may provide initial advice to Ms Jones, for example, to protect the rights of the company with the lodgement of an objection or appeal.
– If Ms Jones decides to proceed with her complaint, then the case manager records full details of the complaint and enters the information on to a central database.
– The case manager outlines to Ms Jones the process for dealing with her complaint.[199]
– The case manager works with Ms Jones' contact officer and her or his manager to investigate the problem and to try to reach a resolution. This may involve further interaction with Ms Jones.
– The case manager or ATO contact officer advises Ms Jones of the outcome of the investigation into her complaint and, as appropriate, advises her of any further action she can take, such as taking the complaint to the Taxation Ombudsman.
– It is only if Ms Jones is still dissatisfied after the case manager has taken all possible action to resolve the dispute that it is expected that the Taxation Ombudsman would become involved. Given the nature of the complaint, the 'mistreatment' of company personnel during an audit, it is unlikely that this could give rise to a decision reviewable by a tribunal or court.
– Whatever, the outcome the case manager enters details of the complaint process and outcome onto the central database and this is the first step in a comprehensive process of reporting and analysis.
– Monthly reports are made by ATO Complaints to the ATO Executive.[200] They include: complaint volumes; performance against identified key performance indicators such as service standards and other quality assurance measures; and alerts about issues that have led to or are likely to lead to complaints, including systemic issues.
– Every quarter, a random sample of complaints is selected across all business lines and complaint types and reviewed by a panel drawn from across business lines. A general report on the review is circulated and

[199] NADRAC, above n. 112, p. 98, informed participation is an important component of the recommended code of practice.

[200] The ATO Executive constitutes the senior management of the ATO. *See* the Organisational structure and reporting arrangements on <www.ato.gov.au>, 1 August 2006.

the results are included in the monthly reports by ATO Complaints. Individual results are provided to the 'complaint resolvers' in the business lines. The outcomes of the review also inform the staff training and skills development strategies.

– Each business line has a national complaints coordinator responsible for the complaints network in their line. It is her or his responsibility to influence the culture such that the Charter becomes a living document for ATO staff. He or she is responsible for monitoring and reporting on trends and issues and for developing the skills in her or his network to deal appropriately with complaints. Every eight weeks the national coordinators meet to discuss issues of complaint management at line level and within the ATO generally.
– Each business line has a senior executive officer responsible for the complaints portfolio, known as a complaint sponsor. The complaint sponsor's responsibility is to provide support for the complaints function and to act as an escalation point for strategic and systemic issues, particularly when the complaint sponsors meet, some three times per annum.
– Any process or meeting that identifies a systemic problem likely to generate complaints on an ongoing basis is referred initially to ATO Complaints for resolution. There are processes to ensure that all systemic issues that are identified are recorded on a central database, and then managed and reported. ATO Complaints prioritises the issues in its monthly complaints report and works with business lines to develop solutions.
– Continual staff development and training focuses on both training in the system and more specific complaint handling skills. Training is designed to reinforce the Charter culture. An ATO Complaints Support team provides ongoing support to complaint handling networks and the complaints call centre and focuses on issues that can improve complaints handling.

F. Analysis

This description of the process provides sufficient information to identify broadly how the ATO complaints model measures up to the Ury, Brett and Goldberg model. It is more easily done because of the 2005 independent survey of Charter perceptions commissioned by the ATO.[201]

[201] TNS, above n. 166. *See also* M. D'Ascenzo, above n. 131.

1. Prevent unnecessary conflict through notification, consultation and feedback

The first principle is aimed at avoiding conflict before it starts and preventing future conflict. Taxpayers are made aware of the complaints process in almost all communication with the ATO. Letters, forms, the website and notices of assessment, for example, all contain details of how to complain. The process is set out in detail both generally as part of the Charter documentation and specifically when a taxpayer initiates a complaint. Articulation of the process reinforces its confidentiality, which is also separately identified with its own complaint process to the Privacy Commissioner. This ensures informed participation, access and fairness in procedure in accordance with the NADRAC code of practice.[202]

Consultation is built into the ATO model to ensure that there is the opportunity to identify a conflict, to clarify the issue and focus on the interests of both parties.[203] Most ATO interaction with taxpayers involves exchanges of views and, often, informal meetings. Taxpayers are usually represented at these meetings by a tax adviser, who provides a counter to the position of power that the ATO almost always holds. If disputes arise at this level, the process builds in consultation between the taxpayer and the ATO officer's supervisor. The next level of complaint to ATO Complaints may involve consultation. The continued involvement of the original ATO officers involved in the dispute ensures a problem solving approach that may help prevent the taxpayer perceiving that a solution is being imposed by third parties. This could avoid subsequent escalation on other issues, following the Dual Concern Model of Conflict. Where there is no resolution of the problem it is important that there is explanation of the monitoring process by the ATO to ensure that taxpayers feel that although their concerns have not been resolved, there are measures in place to ensure that systemic issues are addressed. The 'living the Charter' training and focus of ATO Complaints and the business lines, if implemented successfully, should result in an even stronger sense that taxpayers are receiving a fair hearing when they complain.

The TNS survey shows strong support for the work that the ATO has done in this area.[204] The comparison between the 2005 and 2001 reviews of the

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202 NADRAC, above n. 112, p. 99. K.A. Slaikeu and R.H. Hasson, above n. 187, p. 54, emphasise the importance of internal mechanisms within the system to help parties to select and use available conflict management options.

203 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 59.

204 TNS, above n. 166.

Charter showed 'some substantial and consistent improvements since the 2001 Review, albeit in a different ''operating environment'' '.[205] While it did not specifically address the complaints process, the specific strengths of the ATO were seen by taxpayers and tax agents as:[206]

- Treating people fairly and reasonably;
- Treating people as individuals, with an opportunity to outline their situation;
- Manner and helpfulness of staff;
- Clear verbal communication;
- Preparedness to pass on queries if unable to assist; and
- Acknowledgement and resolution of errors.

The weaknesses that were identified were more concerned with the technical advice given, but could flow through to the complaint resolution process. They were:[207]

- A perceived lack of accountability by ATO staff;
- A negative rating on the clarity, tone and language of written communication; and
- A negative rating on the ATO response to complex queries.

The ATO model is designed to ensure that there are procedures in place for analysis and feedback. However, this is through the comprehensive ATO Complaints monitoring and reporting system. The Taxation Ombudsman also provides a kind of feedback in annual reports made to Parliament. There does not appear to be a formal procedure for obtaining specific feedback from the taxpayer. Feedback of this kind would provide information on the success of the dispute handling process and outcomes from the taxpayer perspective. It is important to provide a means to evaluate the system itself on an ongoing basis from the viewpoint of all stakeholders.[208]

Costantino and Sickles Merchant suggest that there should be evaluation of both the impact and effectiveness of the problem resolution system and its administration and operation.[209] Applying it to the tax context, impact and

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205 Ibid., p. 5.
206 Ibid., p. 6.
207 Ibid., p. 7.
208 Ibid., p. 60 and B. Wolski, above n. 186.
209 C.A. Costantino and C. Sickles Merchant, above n. 186, ch. 10.

effectiveness covers the efficiency of the dispute system in terms of lowering costs and reducing dispute time. It evaluates its effectiveness in terms of improved outcomes, durability of dispute resolution and its positive effect in the community. Finally, it examines satisfaction of taxpayers with the resolution process, their relationship with the revenue authority and the outcome of the process.[210]

Measurement of the administration and operation of the dispute resolution system involves a complex assessment. First, there is a review of the functional organisation of the system including issues such as the structure and procedures, guidelines and standards in place, the lines of responsibility, the sufficiency of resources and the relationship between the different components of the dispute resolution system. Second, there is evaluation of ease of access to the system, appropriateness of the procedures in use and the criteria for cases to come into the system. Finally, there is a review of programme quality, including training and education and the competence and qualifications of those charged with resolving or conciliating disputes.[211]

Given the size of the dispute system in tax matters, it would make sense to design a representative evaluation along the lines suggested by Costantino and Sickles Merchant. This could be similar to the longitudinal reviews of the effectiveness of the Charter, which provide a useful starting point for other reviews of this kind.[212] Regular evaluation and assessment of measurable objectives can ensure that the system fulfils its potential. Unless measurement takes place, significant funds and resources are invested based on educated guesswork.

2. Create ways of reconciling the interests of those in dispute

The ATO model meets the broad requirements of the second principle. It is vital that the system does so, as the focus on interests is the underlying theme of the Ury, Brett and Goldberg model. The ATO model provides clear ways to reconcile the interests of the taxpayer and the ATO. The processes to be followed, including the roles of all participants have been set out and should be easy to follow.[213] The information that the ATO provides for taxpayers is

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210 Ibid., 171.

211 Ibid., 175.

212 TNS, above n. 166.

213 NADRAC, above n. 112, p. 98, as a component of the recommended code of practice.

almost always clear and helpful: a major strength of the ATO is its public relations face. The point that there should be no retaliation over complaints is also one that the ATO has had to deal with, for many years, in the face of close public scrutiny. This aspect should not be a problem in Australia, but may be in some jurisdictions.

The hierarchical process of the ATO model provides specifically for a multi-step process. It allows the management of disputes to prevent unnecessary escalation at an early stage. The ATO model does provide for limited multiple entry points to the process at the first level. Although the process is essentially hierarchical, taxpayers can at any time approach the ATO officer responsible for their file, the ATO officer's manager or ATO Complaints. The taxpayer can also go directly to the Taxation Ombudsman. By doing so, however, the taxpayer takes the dispute to the highest level in the informal process.

Although the ATO approach is hierarchical, an advantage of the problem resolution process is that it cuts through the multiple layers of bureaucracy by assigning an ATO Complaints officer to the problem if the case officer cannot resolve the dispute. This overcomes a problem commonly found in revenue authorities, which tend to be 'highly stratified, vertically organized institutions that take pride in their review and approval processes'.[214]

Assisted negotiation is particularly important for taxpayers, as disputes often involve issues of a highly complex and technical nature. Tax advisers are allowed to assist and represent taxpayers at every stage of the ATO model. This provides taxpayers with a trusted and relatively objective viewpoint from someone who may understand aspects of their interests better than they do. For example, a professional adviser would usually be in a better position to understand the penalty provisions in order to be able to negotiate a favourable outcome for the taxpayer. On the ATO side, the use of specially trained ATO Complaints officers to work for resolution of the problem, can help to produce a negotiated outcome.

Once the dispute moves to the Taxpayer Ombudsman, it moves to conciliation or evaluative mediation. Although evaluative mediation does not have the strengths of facilitative mediation in providing the parties with a strongly interest-based process controlled by the parties, it does provide an alternative to the judicial process that can significantly benefit the parties. Where the alternative is to negotiate with the revenue authority or to pursue expensive litigation, it is an attractive process that can fit into the administrative

214 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 130.

framework surrounding most tax systems. Where the content of the dispute means that the judicial process is not available it provides a valuable additional dispute resolution mechanism.

The Taxpayer Ombudsman model of dispute resolution provides a normative or advisory approach based on the range of possible outcomes within the legislative or administrative framework. It is often a review of the Commissioner's process of exercise of his discretion and the dispute is defined within those parameters.[215] The nature of the ombudsman's role generally means that the mediator/conciliator is trained as such and is not necessarily a tax expert. However, as Boulle notes in his definition of evaluative mediation, the role of the Taxation Ombudsman is to 'provide information, advise and persuade parties, bring professional expertise to bear on [the] content of negotiations, [and] predict outcomes away from mediation, such as in court'.[216] It results in a high level of intervention and a quasi-arbitral style, with little control by the taxpayer over the outcome.[217] However, there is an outcome and a sense for the taxpayer that her or his concerns have been heard and considered by an independent third party.

3. Build in 'loop-backs' to negotiation

The ATO model provides effective 'loop-backs' to negotiation at each stage of the process. Even at the highest level, the Taxation Ombudsman negotiates with the ATO on behalf of the taxpayer. The reason for this emphasis on a negotiated outcome is that, for most disputes involving process, there is no recourse to the courts.[218] 'Loop-backs' provide the opportunity to revert to earlier interest-based methods. These can include prevention, further fact-finding or negotiation, all of which are relevant to a tax dispute.[219]

A useful aspect of the ATO model is that there can be a 'loop-forward' from informal to more formal procedures. Wolski supports this, where interest based negotiation between the parties to the dispute is pointless because of the

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215 Australian Commonwealth Ombudsman, above n. 105.

216 L. Boulle, above n. 111, p. 44.

217 Ibid.

218 Discussed in D. Bentley, 'The Taxpayers' Charter: More Than a Mission Statement' (1995-1996), 4 *Taxation in Australia Red Edition*, 259.

219 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 59.

nature of the complaint or the issues involved.[220] In such a situation it would be possible, under the ATO model, to proceed straight to the Taxation Ombudsman, or, if they have jurisdiction, directly to the AAT or the Federal Court. A 'loop-forward' stops stalemates, which could reinforce a negative perception of the problem resolution process. The purpose of the system is to improve the taxpayer experience and therefore voluntary compliance.

4. Provide low-cost alternatives where negotiation fails

It is important to recognize that negotiation between the parties may not result in a resolution of the dispute. Costantino and Sickles Merchant point out, however, that the existence of a back-up mechanism in the event of failure often allows the parties to explore a greater range of interests.[221] In a tax dispute, this might apply to taxpayers, particularly since it gives them a greater sense of control.[222] The potential leverage encouraging the ATO to resolve the matter would be its unwillingness to have it referred to the Taxation Ombudsman. The low-cost alternative and last resort for taxpayers in most procedural matters under the ATO model is to appeal to the Taxation Ombudsman. This involves negotiation by the Taxation Ombudsman, on behalf of the taxpayer, with the ATO.

It is only for substantive issues, and very few procedural issues,[223] that there are relatively low cost alternatives in the STCT and the AAT, which use conciliation as part of their procedures.[224] Although there are limited low-cost alternatives to negotiation for most procedural matters, the existence of the Taxation Ombudsman is important.[225]

A further support to identify systemic problems is the role of the continuous monitoring of complaints by ATO Complaints, the Taxation Ombudsman,

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220 B. Wolski, above n. 186. This also meets the NADRAC code of practice requirement for information on how and when the ADR process may or should be terminated, above n. 112, p. 98. *See also*, K.A. Slaikeu and R.H. Hasson, above n. 187, p. 46, where the option to 'loop-forward' to a higher authority while preserving the collaborative framework fits the preferred path for cost control.

221 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 60.

222 Ibid., p. 61.

223 D. Bentley, above n. 218.

224 *See* P. Gerber, above n. 125.

225 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, p. 56. K.A. Slaikeu and R.H. Hasson, above n. 187, p. 28 and p. 37 analyse the risks of introducing power plays and avoidance into the resolution process.

the Inspector-General of Taxation and the Board of Taxation. There are few revenue authorities in the world with such a comprehensive range of oversight bodies as in Australia. This is not pertinent to the problem resolution process except that a comprehensive and systematic review of systemic problems will ensure that the number of complaints reduces.

5. Create sequential procedures moving from low-cost to high-cost

A potential problem with the ATO model is that the procedures are apparently low-cost but can involve significant unexpected and hidden costs to the taxpayer. The ATO dispute resolution process often does involve the cost of a long-term involvement by professional advisers. It also requires substantial input by the taxpayer, in time spent preparing for, and participating in, negotiations. In the context of tax matters there may not be an easy answer, given that advisers are often essential to the carriage of the issue. The costs would not differ greatly on the entry point at the first ATO level or the second, Taxation Ombudsman level. The costs would increase in direct proportion to the length of time that the negotiations take because most of the costs are related to the time and effort put in by the taxpayer and any adviser. There is a significant step-up in costs if the dispute is taken to the AAT or the Federal Court (where that is an option). If a taxpayer enters a dispute at the ATO level, the potential increase in cost in taking it to the Taxation Ombudsman level is not significant as access to the Taxation Ombudsman is free. Ury, Brett and Goldberg argue that there should be a noticeable increase in transaction costs at each level, to increase the pressure for a negotiated outcome at an early stage.[226] This is achieved as soon as there is escalation to a tribunal or court. It is inappropriate to have a significant increase in cost in moving the dispute from a negotiation with the ATO to a review by the Taxation Ombudsman. To do so, would give taxpayers restricted access to independent review, which is one of the virtues of the process.

6. Provide the necessary motivation, skills and resources to allow the system to work

The TNS survey suggests that the ATO has managed very skilfully the appropriate training, skilling, resourcing and motivation of its staff involved in

[226] W.L. Ury, J.M. Brett and S.B. Goldberg, ibid., p. 63.

problem resolution to achieve strongly favourable responses from taxpayers and stakeholders.[227] The comprehensive monitoring and review of both individual and systemic complaints provides a solid basis for the ongoing integrity and effectiveness of the model. As ADR in Australia develops, it will be important for its officers to meet the benchmark standards required of ADR practitioners.[228] The ATO acknowledges that the internal culture of the ATO is vital to the success of effective problem resolution.[229] ATO management's systematic and continued support of the problem resolution framework is an important and powerful motivator.[230]

On the other side the ATO must maintain its education programme to ensure that taxpayers are both aware of the options for dispute resolution and are comfortable using them. The existence of this programme orients taxpayers to a value system that supports early resolution of disputes and recognizes the rights and responsibilities of all parties.[231] The next stage in the process for the ATO is to ensure that taxpayers see the ATO as accountable. This was the weakest area in the TNS survey and is relevant to any dispute resolution process.[232] TNS say that the implications for the ATO are that:[233]

- there needs to be a strong focus on demonstrating accountability;
- this needs to be inculcated into staff training and staff management strategies; and

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227 TNS, above n. 166.

228 NADRAC, above n. 112, p. 55, states that. 'These standards include requirements in relation to education, training, assessment, selection, supervision, professional development and discipline'.

229 M. D'Ascenzo, above n. 131. It is a common issue across tax jurisdictions. The culture and organisation of tax administration is discussed further in Chapter 7 and includes the problem not only of integrity in the system as a whole, but the difficulty in ensuring a consistent culture across the revenue authority. The US National Taxpayer Advocate refers to this problem explicitly in her *National Taxpayer Advocate's 2007 Objectives Report to Congress*, 30 June 2006, <www.irs.gov/advocate/>, 1 October 2006, in which she makes the illuminating statement: 'in the IRS today, enforcement employees work on enforcement initiatives, and taxpayer service employees work on taxpayer service initiatives, and never the twain shall meet', (iv).

230 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 61.

231 K.A. Slaikeu and R.H. Hasson, above n. 187, p. 122.

232 TNS, above n. 166, p. 7.

233 Ibid.

– the way 'accountability' is described in the Charter should be defined from the taxpayer's perspective of 'taking ownership of an issue' and 'seeing it through to closure/resolution'.

Given that the survey was not directed specifically at problem resolution, some of these issues may have been addressed in that process. Nonetheless, a strengthening of perceptions of ATO accountability generally will also strengthen taxpayers' perceptions of the problem resolution process.

7. Additional principles

Costantino and Sickles Merchant raise the concern that the designer of organisational systems is often cast in the role of 'expert' to the exclusion of the participants.[234] This is a distinct danger for a dispute resolution framework within a tax system. The framework is usually designed by legislators or revenue authorities with some consultation.[235] It is called an 'authority-reactive' system that dictates how disputes will be handled and imposes decisions on disputants.[236] There is not a significant difference in approach from a court based system.

There was extensive consultation with the community and taxpayer representative groups in Australia prior to the introduction of the Charter in 1997, followed up by a review with further consultation prior to the implementation of a revised Charter in 2003.[237] However, this process did not focus on the detail of the dispute resolution mechanisms and process. Internal ATO experts designed a system that they felt would best suit the existing ATO structure and meet the needs of the stakeholders. It is therefore an 'expert-imposed' system that manages or accommodates conflict to produce the best possible outcome in the particular situation.[238] However, substantial changes have occurred over time to the systems and processes to make them more effective. The danger in using an 'expert-imposed' system within a complex tax bureaucracy is where change cannot

234 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 47.
235 *See* the criticism of the US approach in A. Greenbaum, above n. 157, p. 347.
236 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 55.
237 For a detailed analysis of this process, *see* S. James et al., above n. 186, p. 336.
238 C.A. Costantino and C. Sickles Merchant, above n. 186, p. 55.

or does not occur to meet the concerns of the taxpayers. It is likely to become irrelevant and ossified.[239]

The most difficult form of dispute system design for a government bureaucracy is the most effective form: 'stakeholder-derived' systems designed as an ongoing process.[240] These systems accept conflict and provide a participative, open and flexible dispute resolution process. They may be feasible in the future, but the degree of stakeholder participation required means that a consultative 'expert-imposed' system is likely to be the preferred model for tax system dispute resolution. However, as the ATO system has shown, to succeed it has to be reflective and open to continual improvement.

Another concern with the Ury, Brett and Goldberg model is that it does not address the larger picture of systemic conflict or problems with individual or organisational responses to conflict.[241] James et al. demonstrate that the comprehensive review and ongoing development of the Charter framework in Australia provides a model that does deal with these big picture issues.[242] The Charter in Australia is not disconnected from tax administration as a whole. Further input into its future development will flow from the reports of the Inspector-General of Taxation, a position designed to identify for correction systemic issues in the administration of the tax system.[243]

When a dispute resolution process is introduced, its effectiveness will be determined in large part by how seriously officers in the revenue authority view the dispute resolution process.[244] A top-down implementation is insufficient in itself. This will also determine its take-up. Taxpayers need to see the system working if they are to continue using it to any significant degree.[245]

At the organisational level, a dispute resolution process must be supported by a quality framework.[246] NADRAC suggests that this should include a

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239 The TNS survey, above n. 166, suggests that the success of the Australian Charter is significantly dependent on the commitment of the ATO to ensure that staff 'live the Charter'.

240 Ibid.

241 Ibid., 47.

242 S. James et al., above n. 186.

243 Above n. 172.

244 For example, internal dispute resolution mechanisms in the Debt Management Area of the ATO were severely criticised by the Commonwealth Ombudsman. *See* D. Evans, above n. 152.

245 B. Wolski, above n. 186.

246 NADRAC, above n. 112, ch. 3 and p. 99.

quality review or audit, reporting and accountability.[247] Most revenue authorities would have an organisational quality framework in place, but if not, there should be a regular quality review implemented as part of any dispute resolution process. This should include service standards for measurable objectives.[248]

The final principle in the Ury, Brett and Goldberg model includes the requirement that personnel are appropriately qualified to manage the dispute resolution process.[249] There should be a formal process of assessment to determine qualifications.[250] It is insufficient simply to transfer a revenue officer from a different area and expect that officer to be able to resolve disputes. An assessment needs to be made as to the suitability of the qualifications and experience of an officer, before he or she become a member of a dispute resolution team. Appointments based on seniority or political influence rather than merit will undermine the process and seriously impair its effectiveness.[251] The assessor must have the experience and qualifications to make the assessment and the authority to implement the assessment decision.

Before a person is appointed, he or she may need either formal or on the job training. Revenue authorities increasingly contract out training to external providers and this can be a useful mechanism to ensure its quality, while also often providing the officers concerned with an accredited qualification.[252] As

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247 Ibid., p. 65.

248 ATO, above n. 198. *See further above* n. 105. *See*, *e.g.*, S. James, T. Svetalekth and B. Wright, 'The Benefits of a More Strategic Approach to Tax Administration and the Role of Performance Indicators', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006); M. Klun, 'Performance Measurement for Tax Administrations: The Case of Slovenia' (2004) 70(3) *International Review of Administrative Sciences*; 567; and P. Seera, 'Performance Measurement in Tax Administration: Chile as a Case Study' (2005) 25 *Public Administration and Development*, 115.

249 A. Schlemenson discusses the difficulties in achieving this in developing tax administrations in 'Organizational Structure and Human Resources in Tax Administration', in R.M. Bird and M. Casenegra de Jantscher, above n. 188, ch. 10. NADRAC, above n. 112, ch. 5 contains an extensive description of the knowledge, skills and ethical requirements of ADR practitioners.

250 NADRAC, ibid., p. 81.

251 A. Schlemenson, above n. 249, p. 360, where he makes the point that where developing countries have in place a performance review process it should 'support employee promotions and career development and ensure consistency'.

252 The ATO has formed an alliance with the University of New South Wales to provide tailor made programs through the ATAX unit in the Faculty of Law.

accreditation of ADR practitioners becomes more common, it would be useful to have as a quality measure that all senior officers involved in problem resolution have an accredited qualification. The diversity of accreditation, given the range of ADR may require the revenue authority to require particular types of qualification suited to its processes.

Another measurable standard would be a requirement for all revenue officers involved in dispute resolution to complete a certain number of hours per annum of continuing professional development.[253] This would be in the context of the overall requirement for continuing professional development and may need to be developed in conjunction with the relevant industrial or employment agreements or contracts.

The ATO Model relies heavily on the ATO Complaints officer and business line 'complaints resolver' to manage ATO obligations after the problem resolution process is concluded. NADRAC emphasises this final step in the ADR process as an important component of its code of ADR practice.[254] Effective closure is essential to ensure that the overall experience for the taxpayer is favourable, even if the substantive outcome is not what was sought. From a compliance perspective, the experience is important[255] and ensuring effective closure may require a specific emphasis in officer training.

G. Conclusion

Enforcement of administrative rights and goals is increasingly effective because of the wide range of mechanisms for enforcement that are now available in most jurisdictions. The focus on governance and risk management ensures that greater attention is paid to the implementation of published promises and guidelines. So, too, does a performance-based management approach using objective measures such as key performance indicators or benchmark measures to judge performance of the revenue authority. In conjunction with this move towards transparent and accountable government, oversight and review agencies provide a framework for government to take a proactive approach to dealing with the problems of its citizens.

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253 C.A. Costantino and C. Sickles Merchant, above n. 186, ch. 8 and K.A. Slaikeu and R.H. Hasson, above n. 187, ch. 13.

254 NADRAC, above n. 112, p. 98.

255 As discussed in Chapter 2.

At the review level, relatively informal mechanisms and bodies are designed to facilitate interest based problem resolution at an early stage in any conflict. Dispute resolution is increasingly facilitated by both the revenue authority and independent agencies. For example, an office of ombudsman or similar review body is accessible to the general public and can take up a much more comprehensive range of issues and problems than can the courts.

This Part used ADR theory to identify the characteristics of effective administrative enforcement, since the mechanism itself or its form is secondary to the characteristics of the process. Mechanisms will vary according to jurisdiction, legal system and a range of factors specific to that country. The principles underlying the processes remain the same.

From the Social Conflict model the optimal approach is to problem solve and try to find a solution that satisfies the interests of both sides.[256] It is important to move away from the conflict resolution that is rights-based (where the outcome is determined according to rights such as legal standards) and power-based (where the outcome is determined according to who is more powerful), as these constitute a bad experience for the taxpayer.[257] This approach can also allow the conflict to escalate and spill over into other areas of interaction.[258]

The ATO case study identified the successful application by a revenue authority of an alternative model of dispute resolution. Importantly it is based on domestic and international complaints handling standards and this should be the starting point for any dispute resolution system within a revenue authority. The principles are broad, clear and necessary to implement a successful complaints handling mechanism. The Model should support the application of the principles of ISO 10002:2004, the International Organization for Standardization *Quality management — Customer satisfaction — Guidelines for complaints handling in organizations*.[259]

Based on the successful application by the ATO of the principles put forward by Ury, Brett and Goldberg[260] in its Charter dispute resolution

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256 D.G. Pruitt and S.H. Kim, above n. 132, p. 5 *et seq*.

257 Ibid.

258 Ibid., ch. 5 and 6.

259 ISO, above n. 192.

260 W.L. Ury, J.M. Brett and S.B. Goldberg, above n. 110, ch. 3. Principle 1 was principle 4 in their earlier work. This model is widely used in dispute systems design. It is analysed in C.A. Costantino and C. Sickles Merchant, above n. 186, p. 46. A similar approach is found in K.A. Slaikeu and R.H. Hasson, above n. 187, p. 29, the Collaboration Option and *see* ch. 5, 'The Preferred Path for Cost Control'.

process, the Model should include all six, with two additional principles as follows:

1. Prevent unnecessary conflict through notification, consultation and feedback.
2. Create ways of reconciling the interests of those in dispute.
3. Build in 'loop-backs' to negotiation.
4. Provide low-cost alternatives where negotiation fails.
5. Create sequential procedures moving from low-cost to high-cost.
6. Provide the necessary motivation, skills and resources to allow the system to work.
7. Provide effective mechanisms for measuring qualitative success.
8. Provide mechanisms for monitoring, review and continuous improvement both at individual and systemic levels.

The combination of the approaches set out in this Chapter will ensure effective enforcement of the whole range of taxpayers' rights and are included in the Model in Chapter 9.

IV. Conclusion

Chapter 5 has developed an analysis of enforcement for both legislative and administrative rights. In the first part it identified the importance of providing effective legislative mechanisms to support the implementation of taxpayers' rights. These were reinforced by additional mechanisms such as an interpretation clause and scrutiny committees. The approach recommended and included in the Model in Chapter 9 as best practice, can be implemented in most jurisdictions.

The same general applicability was the basis for the recommendations for administrative dispute resolution in the second part of Chapter 5. The ATO model of dispute resolution provides a useful example of the detailed implementation of effective administrative enforcement of taxpayers' procedural rights. Examining the ATO model in the context of dispute design theory allowed the development of recommendations for inclusion in the Model. They also represent best practice.

Now that the rationale, basis, context and enforcement of rights have been analysed to provide a basis and framework for a Model, it is time to examine the rights that it should include. Chapters 6-8 analyse the different types of rights and establish the standards that should be included in the Model as a guide to best practice in tax administration.

CHAPTER SIX

Analysis of Primary Legal Rights[1]

I. Introduction

Chapter 2 acknowledged that although there are arguments that rights are relative and their content may be based in a particular culture, there is sufficient content that is widely accepted to construct a model of rights as a guide to

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[1] As indicated in Chapter. 1, the literature devoted to a general conception of taxpayers' rights is limited. However, in recent years a number of leading thinkers in tax have provided depth and insight that go significantly beyond the author's early work in the field. This chapter draws together much of that thinking. It also explores some of the literature that has analysed individual rights. This exploration is limited by space: concepts such as the meaning and application of legal professional privilege are themselves the subject of multiple volumes. The primary works that provide the foundation for this Chapter are: M. Buquicchio-de Boer, 'Tax matters and the European Convention on Human Rights' in *Taxation and Human Rights, A Survey of Case-law* (International Fiscal Association, 1987), p. 59; OECD, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (1990, OECD); OECD Centre for Tax Policy and Administration, Tax Guidance Series, *General Administrative Principles — GAP002 Taxpayer Rights and Obligations* (OECD, 2001); D. Bentley, 'Formulating a Taxpayers' Charter of Rights: Setting the Ground Rules' (1996) 25 *Australian Tax Review*, 97; D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998); D. Albregtse and H.P.A.M. van Arendonk, (eds.), *Taxpayer Protection in the European Union* (The Hague, Kluwer Law International, 1998); A. Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil and Common Law Countries — Have New Zealand Taxpayers Been ''Short-Changed''?' (1999) 32 *Vanderbilt Journal*

best practice in tax administration. The rights within the model can then be applied within the particular context of the legal and tax system of each jurisdiction.

In formulating a model it is impossible to take account of the legal, cultural and social context in which a model may be applied. To that extent, it is a sterile process. Laws should never be taken from one jurisdiction and enacted as they stand in another, as many developing countries have discovered to their cost. A model's value is where it can be used as a guide to the development of new systems and processes that can be tailored specifically to fit within those that already exist in a jurisdiction. The development can take account of the structure and content of the legal system, nuances in the use of language and important cultural and other differences identified in Chapter 3. It can also be adopted on an incremental basis in jurisdictions where the ability to change is constrained and must take place over time.[2]

Chapters 6 to 8 identify the rights that should be included in a model with a brief analysis of each. Chapter 9 provides a two-tiered model of rights based upon the analysis. The justification for a two-tiered model was given in Chapter 2.

The rights included are based in the principles analysed in Chapter 3. As noted in Chapter 3, there will be differences in interpretation of the rights. The history of the OECD Model Tax Convention on Income and Capital shows that there will be debate over content, but this comes back to the requirement to contextualize and integrate the rights into the legal system and culture of each jurisdiction. The need for precise definition even where there is broadly common content is not as great in a model designed for integration into a

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of Transnational Law, 1345; and P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights—An International Codification* (London, European Financial Forum, 2001). Other valuable works dealing with individual rights or individual jurisdictions are footnoted. L. Murphy and T. Nagel, *The Myth of Ownership: Taxes and Justice* (New York, OUP, 2002); S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004); M. Lang (ed.), *Direct Taxation: Recent ECJ Developments* (The Hague, Kluwer Law International, 2003); S. van Thiel, *EU Case Law on Income Tax* (Amsterdam, IBFD Publications, 2001); and J. Tiley, *Studies in the History of Tax Law* (Oxford, Hart Publishing, 2004).

2 'Apparently no compelling case can be made for assuming that social objectives should be very different in developing countries, though the political constraints on feasible changes may be more pervasive and harder to analyse, as they typically affect the administration of the tax system in addition to shaping its design.' *See* D. Newbery and N. Stern (eds.), *The Theory of Taxation in Developing Countries* (New York, OUP for the World Bank, 1987), p. 202.

domestic legal system. It only becomes an issue where two systems intersect. This will occur more often with the increase in information exchange, but it will be up to the double tax agreements or specific information exchange agreements to deal with the cross-jurisdictional issues.

The content will depend on the method of enforcement and in Chapters 6 to 8 the analysis highlights the differences in content depending on the classification of the right as administrative or legal. The analysis distinguishes where relevant between primary and secondary rights and also, where there is administrative enforcement, between rights and goals. However, because there are significant variations in the forms of enforcement, it is only certain of the primary legal rights that are considered separately and first in Chapter 6. These must almost all be legislated and focus on the fundamental principles that underlie the tax system. Thereafter, in Chapters 7 and 8, the rights are analysed following a functional analysis. Chapter 7 covers the general powers of administration good governance and administrative goals. Chapter 8 analyses general principles of administration, information gathering, audit and investigation, assessment, sanctions and enforced collection, and objection and appeal.[3] The fundamental procedural rights (rules 12 to 15 below) are also considered within these criteria. Although there is usually separate legislation providing for these rights and it is often contained in the broadest sense in the constitution, in the tax context these rights are most usefully considered in the context of the significant subsidiary rights that support them.

The starting point in determining the rights for inclusion in a model is a sophisticated tax system in an OECD country, but usually a system that has seen significant development.[4] The OECD has long emphasised fundamental rights in the legal process, including tax regulation. Countries such as Canada, Australia, New Zealand, the United States and Germany have legislated or codified much of the regulation governing their tax systems. They have also provided taxpayers with significant rights not available in many jurisdictions. A review of the tax systems in countries such as these provides a broad framework of rights. The rights are sourced in formal law, administrative regulation

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[3] This was the approach taken in the comparative analysis of taxpayers' rights in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1. It is also broadly the format suggested in P. Baker and A.M. Groenhagen, above n. 1, p. 37.

[4] The last decades have seen significant reform of OECD tax systems and with it the expansion of taxpayers' rights, particularly primary and secondary administrative rights. For an analysis of tax reform *see* K.C. Messere, *Tax Policy in OECD Countries: Choices and Conflicts* (Amsterdam, IBFD Publications BV, 1993).

and statements of intent. Examples of the latter are the statements of taxpayer rights that are published in countries such as the United Kingdom, Canada, New Zealand and Australia. The statements themselves have no force of law, but are indicative of the rights that are seen as important.

The analysis in this chapter provides examples to support the rights included. It is beyond the scope of this book to provide examples from every family of tax system.[5] The examples chosen are therefore illustrative only.

The basis for including a right is one or more of: general acceptance of that right in a number of jurisdictions, whether legislative, administrative or judicial; inclusion in treaties or other international documents; support from other sources such as academic and other commentators; and general compliance with one or more of the principles set out in Chapter 3, where this is appropriate. Although it may seem arbitrary, there is fairly broad consensus on the protection that taxpayers should be afforded. The form and enforcement of the rights identified is a matter for debate. Chapters 6 to 8 aim to provide a model with analysis that will take forward the debate from a general acceptance and scattered implementation of taxpayers' rights to a more systematic recognition and implementation. The chapters provide a tool to analyse the effectiveness of different tax systems in providing taxpayers' rights and to help identify gaps in the rights provided within those systems.

II. Primary legal rights

Primary legal rights are fundamental to the operation of the tax system and can be identified separately from those within the tax system. For that reason, it is more difficult to say that they are specific to taxation than it is for other taxpayers' rights. Primary legal rights are usually found in constitutions, legislation protected by interpretation clauses, or international agreements. By nature they are concerned with higher order questions, such as what makes a valid tax law.

For the purpose of this book the emphasis is not on when a law is valid. The assumption is that the starting point is with a system that has mechanisms

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5 For a description of the different tax families, *see* V. Thuronyi, *Comparative Tax Law* (The Hague, Kluwer Law International, 2003), ch. 2. *See, generally* R. David and J.E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (3rd edn., London, Stevens & Sons, 1985).

to create valid rules (legal or administrative) that are enforceable. Wellman analyses the position set out thus far in this book:[6]

> There are three parties or classes of parties to any right. A first party is anyone who possesses the right. A second party is anyone against whom the right holds. A third party is anyone in a position to intervene in the presupposed confrontation between a right-holder and a second party and side with one principal adversary against the other. The essential purpose or function of any legal right is to confer upon its possessor a specific sort of dominion over one or more potential adversaries. The right achieves its purpose only if the legal norms that define and confer it are respected by those subject to the law. . . .

Given the existence of valid rules, the next question is what makes a good rule. This is a moral question that has perplexed jurists for centuries. An approach that asks what is a good rule is described by Critical Legal Studies scholar, Duncan Kennedy, as the 'natural law approach'[7] to determine whether the rationale for the law makes sense. If it does not, he argues that this methodology requires us 'to formulate an alternative rationale that satisfies us of the rationality and justice of the outcome'.[8] It can be distinguished, for example, from the critical approach that seeks to discover and deconstruct the underlying motive behind the original law and the instrumental or interest analysis that analyses the interests behind the original law.[9] The advantage of the approach taken here is that it begins from a widely accepted position and seeks to improve upon that position. It is not the purpose of this book to analyse whether the accepted position is a flawed starting point.

The jurisprudence of Lon Fuller provides useful guidance on the characteristics of a good law once it is accepted as valid.[10] Fuller helps to identify what a good rule looks like. His discussion can be adapted to the context of tax law to determine the rules that should govern the formulation and

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6 C. Wellman, *A Theory of Rights: Persons Under Laws, Institutions and Morals* (Totowa, Rowman and Allanheld, 1985), p. 102.

7 D. Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 *Buffalo Law Review*, 209, 219.

8 Ibid.

9 Ibid.

10 Fuller's approach was criticized by jurists such as Hart and Raz on the basis that Fuller failed in his analysis of the special features of legal systems, i.e., in determining 'what is law?'. However, the criticisms did not extend to the legitimacy of his question, 'what are some of the criteria for judging when a law is a good law?'.

interpretation of 'good' tax law. Lon Fuller's list of 'Eight Ways to Fail to Make Law' is a starting point.[11] Jurists may argue over whether the legal system has failed if any of these rules is absent, but for this book it is sufficient that they raise some important issues in the context of taxpayers' rights and what makes a 'good' tax law. Winston points out that Fuller's critics disagree that these canons are part of the nature of law or that they identify a necessary connection between law and morality.[12] However, they do not quibble with the proposition that the rules may be necessary or at least beneficial for a legal system to succeed.[13] With this caveat, it is acceptable to apply Fuller's argument that for a ruler who will fail to make 'good law':[14]

> There are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicise, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

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11 L.L. Fuller, *The Morality of Law* (London, Yale University Press, 1964), p. 33. While not necessarily agreeing with Fuller, jurists have often used his criteria as a starting point for their argument. For example, J. Finnis, in *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980), p. 270, begins there in his analysis of what is a legal system that exemplifies the rule of law.

12 K.I. Winston, 'Introduction' in K.I. Winston (ed.), *The Principles of Social Order* (Durham, NC, Duke University Press, 1981), p. 11, p. 35. Raz draws on and expands Fuller's rules in J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford, Clarendon Press, 1979), 195 *et seq*. They are discussed extensively by C. Sampford, *Retrospectivity and the Rule of Law* (OUP, Oxford, 2006), ch. 2 in the context of a broader discussion on 'The Rule of Law', which summarises many of the major theorists on the topic.

13 Ibid.

14 L.L. Fuller, above n. 11.

Each of these failures provides a basis for a primary legal rule in a Model of Taxpayers' Rights. Each rule also reflects the basic principles that should underlie a tax system, discussed in Chapter 3. They can be rephrased with the references to the basic principles in brackets.

1. Tax must be imposed by law (tax rules should not be arbitrary).
2. Tax law must be published (tax rules should be transparent).
3. Tax law must not be imposed retroactively (taxpayers should be able to anticipate in advance the consequences of a transaction).
4. Tax law must be understandable (tax rules should be certain: clear and simple to understand).
5. Tax law must not be contradictory (tax rules should be certain).
6. Taxpayers must be able to obey the law (tax rules should be effective and certain).
7. Frequent change must not undermine the tax law (tax rules should be certain).
8. Tax law must be applied (tax rules should be certain, fair, transparent and effective).

   In the context of tax law, rules 4 to 8 focus on different aspects of the requirement for certainty and they will be dealt with on this basis. Rules 1, 2 and 4 to 8 reflect the European Court of Human Rights' threefold test for determining whether an interference with an ECHR right is in accordance with law.[15] It must have a basis in law, the law must be accessible and the law must allow the consequences of an action to be foreseeable or certain.[16]

   The following additional legal rules derive from the basic principles. They are consistently found in sources of primary legal rules such as charters of rights and constitutions. They can be distinguished from secondary legal and administrative rules that often give a different substance to a right expressed in similar terms.[17]
9. Taxpayers need pay no more than the correct amount of tax (tax rules should be effective and certain).

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[15] C. Ovey and R.C.A. White, *Jacobs and White European Convention on Human Rights* (3rd edn., Oxford, OUP, 2002), p. 201.

[16] Ibid.

[17] For example the right of access to the courts is a fundamental right that should have higher order protection through a constitution or similar instrument. The content of that right of access in tax cases is usually a secondary legal rule concerned with the administration of the tax system in the context of the wider court process.

10. Tax law should not impose double taxation (tax rules should be fair and effective).
11. Tax rules should not discriminate and there should be equality before the law (tax rules should be fair and equitable).
12. Tax rules should satisfy the principle of proportionality (tax rules should be effective, fair and equitable).
13. Taxpayers should have the right to privacy (tax rules should be fair).
14. Taxpayers should have the right to confidentiality and secrecy (tax rules should be fair).
15. Taxpayers should have the right of access to information (tax rules should be fair).
16. Taxpayers should have the right of access to the courts (tax rules should be fair), which should demonstrate the following characteristics:[18]
    (a) an independent and impartial tribunal;
    (b) a fair and public hearing;
    (c) a fair trial;
    (d) the right to remain silent;
    (e) the right to representation; and
    (f) public judgment within a reasonable time.

Primary legal rules provide the framework for all other rules. Some of the 16 listed rules may be collapsed more conveniently into a rule that covers more than one concept. Where this occurs in the analysis it is clearly articulated. Each primary legal rule provides the basis for a number of subsidiary rules, which are analysed in Chapter 8. Rules 13 to 16 are considered together with their subsidiary rules also in Chapter 8.

A. Tax must be imposed by law

As noted in Chapter 2, the right to tax is founded in recognition of individual property rights. The corollary is that infringements on property rights by the state, whatever their philosophical basis, must be sanctioned

[18] The European Convention, Art. 6 for the protection of Human Rights and Fundamental Freedoms (1950) (ECHR). Raz explores the importance of the role of the courts to the rule of law, above n. 12, p. 198. It is assumed for this analysis that courts exist and operate in accordance with the basic tenets of the rule of law. If they do not, it is not specifically an issue for the framework of rules governing taxation, but a more general question as to whether there is an operational legal system at all.

by law.[19] The primary requirement for the operation of a tax system is therefore that there is a legal basis for the exaction of tax. This is seen as such a fundamental tenet of the legal system that the power to tax is usually given constitutional sanction with a requirement that tax is imposed by law.

A history of the defence of the requirement to tax under the law reveals some of the most significant developments that have led to modern democracy. The English Civil War was driven in part by the move to end the sovereign's prerogative to tax.[20] In 1789, Article 13 of the French Declaration of Human Rights specifically provided for taxation as the means by which governments can maintain public order and cover their administrative expenses.[21] The beginnings of the American Revolution were attributable in part to the imposition of taxes by the British Government without reference to the elected American legislatures. Even where a tax is legislated, the response of the people can reverse it, as occurred with the 'Poll Tax' in the United Kingdom, which arguably spurred movement towards decentralisation of political power.[22]

This emphasis on the principle of legality for taxation is found in many constitutions.[23] In unitary systems the constitutional provisions focus on legality. In federal systems the constitutional underpinning of the principle

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[19] For example, ECHR Art. 1 of the First Protocol (as amended), which provides for the entitlement to the peaceful enjoyment of possessions, specifically excepts the right of a state to secure the payment of taxes or other contributions or penalties, but it only does so if there is a legal basis for its action. There are also requirements that the measures taken are in the general interest of the state and are proportionate, when balancing the individual and general interests. *See* M. Buquicchio-de Boer, above n. 1, p. 59.

[20] As noted in F. Vanistendael, 'Legal Framework for Taxation' in V. Thuronyi (ed.), vol. 1, *Tax Law Design and Drafting* (Washington DC, IMF, 1996 and 1998), p. 15, p. 16, starting with the 1628 Petition of Rights and ending with the acknowledgement in 1689 of the Bill of Rights. For an excellent analysis of later developments, *see* M. Daunton, *Trusting Leviathan: The Politics of Taxation in Britain, 1799-1914* (Cambridge, Cambridge University Press, 2001), and *Just Taxes: The Politics of Taxation in Britain, 1914-1979* (Cambridge, Cambridge University Press, 2002).

[21] Organisation for Economic Cooperation and Development (OECD), *Taxpayers' Rights and Obligations* (Paris, OECD, 1990), p. 10.

[22] For an account of the rise and fall of the poll tax (more properly, the community charge) *see* D. Williams, *Taxation: A guide to theory and practice in the United Kingdom* (London, Hodder and Stoughton, 1992), ch. 1.

[23] For example, in the constitutions of Australia (s. 51), Belgium (Art. 170), Canada (Art. 91(3), France (Art. 34), Italy (Art. 23), Mexico (Art. 31), and Spain (Art. 133). H. Arbutina, 'Taxation in Croatia: Developments in the Field of Taxpayers' Rights and Obligations', in D. Bentley, *Taxpayers' Rights: An International Perspective*,

of legality in tax matters is reinforced by the rules governing jurisdiction to impose tax.

The German constitution for example gives exclusive legislative power to the Federal Government over customs duties and financial monopolies and taxes can only be imposed by law.[24] The Federal Government also has priority in legislating where both it and the Länder have jurisdiction.[25] This means that the Federal Government may legislate where it is entitled to at least some of the revenue from taxes or if the subject matter affects the equality of life or legal or economic unity of the country.[26] The Länder have exclusive jurisdiction over local excise and similar non-essential taxes.[27] Rädler notes that the Bundesrat, or Council of States, can and does block taxation laws proposed by the Bundestag (Federal Parliament).[28]

The most important issue, once the principle of legality is established, is its interpretation. Thuronyi identifies five areas that have given rise to dispute:[29]

1. Where taxes are imposed by administrative regulation.
2. Where revenue authorities enter into individual agreements with taxpayers and it is argued that the tax is then not imposed by the rule of law.
3. Where revenue authorities are given unlimited administrative discretion to decide whether to grant a tax privilege.
4. Where it is argued that judges are required to interpret tax law strictly to avoid effectively making tax law themselves.
5. Where tax laws must be renewed annually.

The last point, as Thuronyi points out, relates to the budget process and is not a general principle.[30] What it does do is require the legislature to make a

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above n. 1, p. 138, p. 151, identifies the legality principle in countries in transition as an important basic criterion for the administration and assessment of tax.

24 Grundgesetz Art. 105(1), and Bundes-Verfassungsgesetz Art. 18.

25 Grundgesetz Art. 74.

26 Grundgesetz Arts. 105(2) and 72(2).

27 *See further*, C. Daiber, 'Protection of Taxpayers' Rights in Germany' in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1, p. 152, p. 153 and A.J. Rädler, 'General Description: Germany' in H.J. Ault, *Comparative Income Taxation: A Structural Analysis* (The Hague, Kluwer Law International, 1997), p. 49.

28 Ibid.

29 V. Thuronyi, above n. 5, 4.3.2.

30 Ibid. The principle is found in Art. 171 of the Belgian Constitution.

conscious decision to ratify the continued application of the tax laws in place as well as any new budget and other provisions. While this might be a useful discipline, it is not essential to the protection of the principle of legality.

The first three points go to the nub of the content of a rule requiring legality. They are concerned with the scope that the revenue authorities have to make decisions that require the exercise of a broad discretion. More specifically, they raise the question as to how much discretion a revenue authority can be given before it is usurping the principle of legality.

The German requirement[31] that there should be a legal basis for any administrative act, including tax assessment and collection is mirrored in many countries, particularly civil law countries. In France and the Netherlands, for example, the tax departments of the Ministry of Finance explain and interpret statutes and decrees, but cannot set new rules.[32] The Swedish constitution appears to be even more stringent in the limitations it imposes on delegated authority.[33]

In common law jurisdictions, subject to the operation of Bills of Rights, there tends to be significantly more scope for delegation and discretion. In Canada,[34] Australia[35] and New Zealand,[36] for example, the revenue authorities are charged with the management of the tax system and have substantial discretion. However, the discretion does not extend to rule-making, which is often a point of some contention between taxpayers and revenue authorities.[37]

The UK seems to give still greater latitude to the Inland Revenue Commissioners to exercise discretion, including extra-statutory concessions.[38]

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31 Grundgesetz Art. 20(3), and *see* F. Vanistendael, above n. 20, p. 17.

32 G. Gest, 'General Description: France' in H.J. Ault, above n. 27, p. 39, p. 45 and A. van Rijn, 'A Comparative Study of Taxpayer Protection in Five Member Countries of the European Union' in D. Albregtse and H.P.A.M. van Arendonk, above n. 1, p. 45, p. 46.

33 P. Melz, 'General Description: Sweden' in H.J. Ault, above n. 27, p. 97, p. 103 and *see* A. Hultqvist, 'Taxpayers' Rights in Sweden' in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1, p. 299.

34 B.J. Arnold, 'General Description: Canada' in H.J. Ault, above n. 27, p. 25, p. 33.

35 For example, Income Tax Assessment Act 1936 (Cth), s. 8; Taxation Administration Act 1953 (Cth), s. 3A, and Fringe Benefits Tax Assessment Act 1986 (Cth), s. 3.

36 Tax Administration Act 1994, s. 6A

37 B.J. Arnold, above n. 34. In Australia, the introduction of a legal basis for the rulings made by the ATO in 1992 in conjunction with the introduction of self-assessment was largely in response to a need for legal certainty.

38 Discussed more fully in A. van Rijn, above n. 32.

Walton J questioned the legality of these powers in *Vestey v. IRC*,[39] but McNeill J in *R v. IRC, ex parte Fulford-Dobson*[40] suggested that they fall within the exercise of the Commissioners' managerial discretion.[41] Williams suggests that a broader exercise of discretion has been encouraged by the lack of constitutional protection and may change over time with the application of the Human Rights Act 1998 to tax matters.[42]

Thuronyi's second and third points are similar. Whether a revenue authority has the power to enter into an agreement with an individual taxpayer or can grant a general privilege such as a tax amnesty to a group or class of taxpayers raises the question of the proper extent of delegation.[43] For taxpayers there is a problem where they can be disadvantaged by such delegation. Usually, negotiation of an agreement or the grant of a privilege, such as an amnesty, results in the reduction of tax payable and is thus more likely to disadvantage other taxpayers rather than those receiving the benefit.

This may be unfair to other taxpayers and result in inequity, such that taxpayers in exactly the same fiscal position are treated unequally. For example, through profligacy a taxpayer may not have sufficient funds to pay tax owing and as part of an audit the revenue authority may reduce the amount payable under a scheme of arrangement. Arguably, a general privilege is preferred as it ensures consistency between taxpayers in the same situation. However, it is also inconsistent vis à vis the majority of taxpayers that have not put themselves in a position that requires a privilege to be given. Exercise of delegated administrative power in this way may be designated as arbitrary in that it goes beyond the interpretation and implementation of the law.

The difficulty lies in balancing the demands of a complex modern administration, where it is impossible for the legislature to determine how and where each rule is to apply, with the need for certainty and fairness for taxpayers. Both benefit from some flexibility in the exercise of delegated authority, particularly to ameliorate the unintended effects of legislation and to assist in voluntary compliance. Neither benefits in the long run from the exercise of delegated authority that stretches the intent of the law. It may be practically

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39 [1978] Simon's Tax Cases, 575, saying that he was 'totally unable to understand on what basis the Inland Revenue Commissioners are entitled to make extra-statutory concessions'.

40 Ibid., p. 344.

41 Ibid., p. 351.

42 D. Williams, 'United Kingdom Tax Collection: Rights of and Against Taxpayers' in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1, p. 331, p. 332, p. 345.

43 F. Vanistendael, above n. 20, p. 18.

simpler, but it is unsustainable to argue that the basic principle of effectiveness should override the principles of equity, fairness and certainty, particularly where to do so undermines the operation of the rule of law.[44]

The 1990 OECD survey was cognisant of this concern and identified which of the surveyed countries' revenue authorities had: discretion to waive or reduce a taxpayer's tax liability or allow grace periods for payment; and the power to negotiate the level of tax penalty applicable to the taxpayer.[45] Waiver powers were limited in almost all countries, except by statute but there were varying levels of latitude in all countries to allow some grace period in the payment of tax in cases of hardship.[46] There was significant divergence in the ability to negotiate the level of tax penalty and, where it was permissible, in the grounds for doing so.

A right to be included in a model cannot take an extreme position unless it is accepted that the extreme is both beneficial and likely to become a common standard. Given the range of approaches to the principle of legality and the delegation of power to administrators to make rules, it is helpful to consider the issues in the context of Article 6 ECHR and subsequent consideration of the nature of a criminal charge in the Netherlands and French national courts.

Article 6 ECHR provides the right to a fair trial with associated rights to everyone charged with a criminal offence. The assumption is that criminal offences are imposed by law, that is, the legality principle. The question in point here is what constitutes a criminal charge that is subject to Article 6? Ovey and White note that the concept of a 'criminal charge' is given an autonomous meaning by the European Court of Human Rights so that states cannot avoid 'Convention controls by classifying offences as disciplinary, administrative or civil matters'.[47] A model of taxpayers' rights, although a standard and not an enforceable treaty, also needs to give autonomous meaning to the concept of permissible delegation to a revenue authority.

In *Engel and others v. Netherlands*[48] the Court examined disciplinary action taken against members of the armed forces in the Netherlands to determine whether they constituted criminal charges under Article 6 or an

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44 *See* the discussion supporting this approach in Fiscal Affairs Department, *Manual on Fiscal Transparency* (Washington DC, IMF, 2001), p. 19. Also available at <www.imf.org/external/work.htm>, 20 October 2006. (IMF Code).

45 OECD, above n. 1, p. 57.

46 Although even the period of waiver is set down by statute in some countries, such as Ireland, ibid., p. 58.

47 C. Ovey and R.C.A. White, above n. 15, p. 140.

48 Judgment of 8 June 1976, Series A, No. 22; (1979-80) 1 EHRR 647. *See further*, C. Ovey and R.C.A. White, ibid.

administrative offence. The Court took into account the nature of the offence, the severity of the sanction and the size of the group targeted. In *Bendenoun v. France*[49] the Court examined the French system of tax surcharges to determine whether it fell within the ambit of an Article 6 criminal charge. The Court found that the surcharges were: imposed under a general rule both to deter and punish; very substantial and could lead to imprisonment; and universal, covering all taxpayers. The Court had already held that a criminal charge need not lead to imprisonment.[50]

The Supreme Court in the Netherlands found in 1985 that where a tax inspector increases an assessment in the form of a major fine it is a criminal charge, applying the *Öztürk* decision.[51] The French *Conseil d'État* made a similar finding in the *Méric* case.[52] Once a tax penalty imposed by a tax inspector is recognized as a criminal charge it is then subject to a wide range of safeguards imposed both domestically and under the ECHR.[53]

In the criminal context, a charge moves from administrative to legal based on the nature of the offence, the severity of the penalty and the breadth of application. By analogy it is arguable that the framework for the operation of an administrative discretion should be spelt out in law where the content and matter of the discretion is significant, the binding quality or effect is substantial and the potential application is broad. To take an example, where a tax inspector has broad discretion to determine a wide range of tax penalties:

- The matter of the discretion is significant both for taxpayers and for the effectiveness of the revenue authority's compliance programme.
- The effect of the discretion can be substantial for the individual taxpayer, the standard of voluntary compliance, and the amount of revenue collected.
- It potentially applies to all taxpayers.

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49 Judgment of 24 February 1994, Series A, No. 284; (1994) 18 EHRR 54.

50 *Öztürk v. Germany*, Judgment of 21 February 1984, Series A, No. 73; (1984) 6 EHRR 409 and *Lauko v. Slovakia* (App 26138/95), Judgment of 2 September 1998.

51 E. Pechler, 'Fiscal Administrative Sanctions' in D. Albregtse and H.P.A.M. van Arendonk, above n. 1, p. 75.

52 *Conseil d' État*, 31 March 1995, Droit Fiscal 1995. No. 18-18, comm. 106 (*Méric*), cited ibid.

53 C. Ovey and R.C.A. White, above n. 15, p. 142. Although much of the jurisprudence of both the European Court of Human Rights and the domestic courts is concerned with limiting the extent of criminal charges to encourage decriminalization, the question of legality remains.

The legality principle does not limit the use of administrative discretion. It does provide a legal basis for the application of a general legal rule to particular cases and guidance as to how that application should occur.[54] In common law jurisdictions, legislation has traditionally been distinguished from executive action on the basis that:[55]

> Legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively), while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases.

How can executive or administrative action be distinguished more specifically from that requiring legislation? The Australian Administrative Review Council suggested a three-pronged test based on the content of the matter to be ruled on, the binding quality of the instrument and the generality of its application.[56] This supports the approach taken in the European Court of Human Rights and in the domestic courts of its signatories.

Thuronyi's fourth point that disputes have arisen over a judge's capacity to make tax law using a broad interpretation of the law through the cases returns to the differences between legal families. Even within the common law family, the difference in approach between the US Supreme Court and the House of Lords or the High Court of Australia is substantial and courts within the same jurisdiction can often have different styles.[57]

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[54] A. Hultqvist, *Legalitetsprincipen vid inkomstbeskattningen* (Stockholm, Juristförlaget, 1995), p. 393 notes that in Sweden it is beyond the power of the National Tax Board (revenue authority) to give an interpretation (even where it has discretion) that is either less or more favourable than that set out by law. Any interpretation outside the normal area of meaning is beyond its authority.

[55] The Donoughmore Committee on Ministers' Powers of the United Kingdom Parliament (Report, 1932, Cmd 4060), cited in D. Pearce and S. Argument, *Delegated Legislation in Australia* (2nd edn., Sydney, Butterworths, 1999), p. 1.

[56] *Rule making by Commonwealth Agencies* (Parliamentary Paper No. 93 of 92) 20, cited in D. Pearce and S. Argument, ibid., p. 2.

[57] It is the subject of popular and political debate. This is particularly evident where an appointment to the highest court can have significant impact on the shape of legislation. *See, e.g.*, 'Statistical modeling: The Wisdom of Hercules', *The Economist*, 27 August 2005, p. 69, which describes research into maps of legal precedent to determine the effect of precedent on the US Supreme Court in line with R. Dworkin's seamless web of the law: R. Dworkin, *Law's Empire* (London, Fontana Press, 1986), ch. 7.

The legislature and the judiciary are two arms of government. They act as a check on the executive.[58] From a taxpayer's perspective, if the judiciary takes a strong purposive approach to interpretation that leads to a different interpretation of the tax law from the common expectation, it can undermine certainty. However, this goes to the nub of the constitutional structure of the state. Taxpayers' rights are realistically going to have little impact on this aspect of the debate. It is far more important that any model of taxpayers' rights focuses on the need for checks on the executive to uphold the legality principle. The form of those checks, whether through the legislature or judiciary will depend upon the constitutional structure and approach of the particular jurisdiction.

In summary, it is possible to identify the key constituents of the legality principle:

1. A tax in its broadest sense must be imposed by law.[59] It helps to have this principle embodied in the constitution, but otherwise it should be stated expressly in the main taxing act, or in individual taxing acts where they are separate and independent.
2. The structure of a tax system requires rules governing tax administration, collection and enforcement, which grant to the revenue authority administrative discretion in a wide range of different contexts.
3. The rules should provide limits on the exercise of all discretion[60] and a precise framework for the exercise of any discretion where:
   (a) the content and matter of the discretion is significant;
   (b) the binding quality or effect is substantial; and
   (c) the potential application is broad.

It could be argued that this protection is embodied in administrative law. However, it goes beyond an analysis of administrative discretion and the relevant administrative law safeguards. It is fundamental to the principle of legality. The operation of Article 6 ECHR shows that how discretion is exercised can determine whether or not a taxpayer is taxed and how much. It is therefore essential to provide a legal basis for what is effectively administrative regulation, as well as for legislative regulation.

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58 *See* IMF Code, above n. 44, 1.1.2 and the explanation, p. 10-11.
59 Ibid., 1.2.2.
60 Ibid.

The UK may have survived without a written constitution for centuries. However, it has had the benefit of those centuries to work out the delicate balance between the executive and taxpayers. For countries that are still developing their systems and finding that balance, the operation of the rule of law and the consistent application of the legality principle is a precursor to the existence of genuine taxpayers' rights. The benefit to those countries is that on a political level it enhances 'the legitimacy of the political group in power'.[61] Arbutina argues that it has the added advantage of transforming 'taxpayers from the objects of the exercise of state power to subjects participating, through the formulation of their rights and obligations, in the shaping of their situation'.[62]

B. Publication of rules

It is self-evident that it is particularly important to taxpayers that all rules governing the tax system are compiled and publicised.[63] Tax systems usually suffer from an overabundance of rules and if there is no duty to publish them, the obvious result is that it is difficult for taxpayers to comply. Taxpayers should be given current information 'on the operation of the tax system and the way in which their tax is assessed'.[64] They should also be informed about their appeal rights.

The point is not as obvious in practice as it first seems. It is only relatively recently, in some jurisdictions, that many of the internal rules applied by the tax authorities in administering the tax system have become available to taxpayers. South Africa is an example.[65] In jurisdictions such as Japan,

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61 G.P. Jenkins, 'Modernization of Tax Administrations: Revenue Boards and Privatization as Instruments for Change' (1994) 48 *IBFD Bulletin*, 75.

62 H. Arbutina, above n. 23, p. 151.

63 It is emphasised by most commentators on tax administration, particularly those concerned with its development in non-OECD countries. *See, e.g.*, R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, above n. 20, p. 95, p. 100 and R.A. LeBaube and C.L. Vehorn, 'Assisting Taxpayers in Meeting Their Obligations Under the Law' in R.M. Bird and M. Casenegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington DC, IMF, 1992), p. 310, p. 314. *See also* IMF Code, above n. 44, 1.2.2 and the explanation, pp. 18-19.

64 OECD, above n. 1, p. 12.

65 *See* B. Croome, 'Constitutional Law and Taxpayers' Rights in South Africa — An Overview' [2002] *Acta Juridica* 1 and R.C. Williams, 'Taxpayers' Rights in South Africa' in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1, ch. 11.

much of the detail as to how the tax authorities operate is arguably still unknown.[66]

In many OECD jurisdictions, the volume of information available is overwhelming. The Internet has assisted significantly in developing transparency and the publication of vast amounts of information that may or may not be relevant to individual taxpayers. It is therefore important that there is some guidance to the information published. In less sophisticated tax jurisdictions it is vital that the information made available to taxpayers is targeted and specific to their particular knowledge requirements. Otherwise taxpayers may not have the skills to identify what the rules are even though they are freely available. The result is then the same as if publication had not occurred.[67]

The problem becomes more acute where there are low literacy levels among taxpayers. There is a tendency to concentrate on indirect taxation in developing countries, usually a consumption tax, as the means of raising revenue from less educated, low-income taxpayers.[68] The education process during the period of implementation is critical and can focus on radio, television and other accessible media. Thereafter, little ongoing education is required for the average taxpaying consumer. An alternative to direct collection from those whose education, background and literacy makes it most difficult to explain the compliance requirements that exist in a complex modern tax system is to use third parties such as employers and financial institutions to collect tax on the taxpayer's behalf.[69]

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66 *See* K. Ishimura, 'The State of Taxpayers' Rights in Japan' in D. Bentley, *Taxpayers' Rights: An International Perspective*, above n. 1, ch. 9 and for an alternative view, M. Nakazato and M. Ramseyer, 'General Description: Japan' in H.J. Ault, above n. 27, p. 71, p. 77.

67 This is an old technique in litigation where discovery of documents can produce literally truckloads of information, in which the relevant documents are carefully hidden in obscure places to escape easy detection. Sir Humphrey Appleby parodied the technique when concealing important papers for signature among those of less consequence in the Prime Minister's 'Red Boxes' in the 1980s television show 'Yes Prime Minister'.

68 *See generally*, A. Tait, *Value Added Tax: International Practice and Problems* (Washington DC, IMF, 1988). For the increasing trend towards the implementation of a VAT, *see* IBFD, *Annual Report*, which publishes each year a worldwide survey of developments and trends in international taxation. *See also*, *e.g.*, 'IMF Commends VAT Introduction in Cameroon' (1999) 18 *Tax Notes International*, 1770 and 'IMF Welcomes Tanzania's VAT' (1999) 18 *Tax Notes International*, 1675.

69 Variants on a Pay As You Earn System are standard for employees in most jurisdictions. Other forms of third party collection have been widely accepted for

However, as aid and state economic development programmes target small business and the development of an entrepreneurial sector, there is a commensurate increase in the number of taxpayers required to comply with more complex tax rules.[70] In countries where the literacy rate is low and participation in education is predominantly limited to the primary level, it becomes a serious challenge for governments and revenue authorities to make the rules available to taxpayers in a comprehensible form.[71]

Almost as important as the publication of rules is the manner of publication. Usually governments publish legislation and delegated legislation together with explanatory material. However, it is seldom easily accessible. It is left to the revenue authorities and commercial printers to distribute the rules and information explaining them. In most OECD countries the growth in the complexity of tax legislation has spawned a burgeoning tax industry comprising the revenue authorities, taxpayers, advisors, publishers, trainers, academic institutions, media specialists and more. The Internet has exacerbated the information flow, but has been a boon to revenue authorities. As taxpayers and their advisors gain ready access to the Internet, the revenue authority website becomes a focal point to obtain authoritative information.

This highlights an important caveat on the publication of rules. Information and explanation of the rules must be published in an impartial and unbiased manner. In Australia in 2005, for example, the Inspector-General of Taxation constituted an inquiry into bias in ATO rulings.[72] If there is bias in the publication by the revenue authority, taxpayers are made aware

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many years, although not without difficulty in many developing countries that do not have the administrative and physical infrastructure and resources to support its implementation. *See, e.g.*, L. Fernando Ramírez Acuña, 'Privatization of Tax Administration' in R.M. Bird and M. Casenegra de Jantscher, above n. 63, p. 377.

70 For example, M. McKerchar, L.R. Ingraham and S. Karlinsky, 'Tax Complexity and Small Business: A Comparison of the Perceptions of Tax Agents in the United States and Australia' (2005) *Journal of Australian Taxation*, 289; T.J. Bartik, 'Small Business Start-Ups in the United States: Estimates of the Effects of Characteristics of States' (1989) 55 *Southern Economic Journal*, 1004; and J.L. Guyton, A. Kindlon and J.A. Zhou, 'Recent Research on Small Business Compliance Burden' in National Tax Association, *Proceedings: Ninety-Seventh Annual Conference 2004* (Washington DC, National Tax Association, 2005), p. 395.

71 *See, e.g.*, K. Yukinobu and T.K. Sarker, 'Technical Assistance in Fiscal Policy and Tax Administration in Developing Countries: The State of Nature in Bangladesh' (2002) 8 *Asia-Pacific Tax Bulletin*, 278.

72 'Review of the Potential Revenue Bias in Private Binding Rulings Involving Large Complex Matters', <www.igt.gov.au>, 1 November 2006.

not of the rules with which they must comply, but the revenue authority's interpretation of those rules. This can lead to a completely different outcome for the taxpayer and effectively undermines the constitutional separation of powers.

The growing complexity of tax rules requires that the information is also available to those charged with administering the tax system so that they can provide accurate, consistent and comprehensive service to taxpayers.[73] Revenue authorities invest considerable amounts in training and equipping staff with an accurate understanding of the law and their role in implementing it, although in developing countries it is but one of a number of areas making demands on limited resources.[74] Internal publication to the large group of revenue authority personnel responsible for implementing the law and exercising discretion under the law is critical to the effective application of the rules. Taxpayers must have reassurance that there is a high quality publication of the rules internally to revenue authority staff as well externally.

If rules are not published accurately or completely it can also impact on the capacity of those charged with adjudicating them. An adjudicator must have access to a complete set of rules or it undermines the process of adjudication and the office of the adjudicator.

C. Non-retroactive rules

A problem fundamental to taxation is retroactive or retrospective legislation. The terms are used differently in different jurisdictions, but Sampford, in his comprehensive study, finds on analysis that there is no effective difference in meaning between the terms.[75] He defines retroactive or

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73 *See* R.A. LiBaube and C.L. Vehorn, above n. 63.

74 *See* R.M. Bird and M. Casenegra de Jantscher, 'Reform of Tax Administration' and A. Schlemenson, 'Organizational Structure and Human Resources in Tax Administration' in R.M. Bird and M. Casenegra de Jantscher, above n. 63, ch. 1 and ch. 11. In the same volume, E. Tulloch-Reid, 'Comments', p. 111 describes development initiatives for tax auditors in Jamaica; and C.E. McLure Jr. and S. Pardo R, 'Improving the Administration of Colombian Income Tax, 1986-88', p. 124 describes the creation of a National Tax School in Colombia to provide tax law training for both the public and private sectors. This mirrors developments in OECD countries, where universities and professional bodies provide training and qualifications for both sectors, *e.g.*, The Chartered Institute of Taxation in the UK and ATAX in Australia.

75 C. Sampford, above n. 12, ch. 1, 'Defining Retrospectivity'.

retrospective laws as 'laws which *alter the future legal consequences of past actions and events*'.[76] One of the tenets of most legal systems is that certain legislation should not have retroactive effect. This flows from the prohibition on retroactive criminal laws in international instruments such as Article 15 International Covenant on Civil and Political Rights and Article 7 ECHR. The courts have interpreted these provisions as an extension of the principle of legality: any provision authorizing interference with an individual right should be sufficiently precise to render the interference 'in accordance with the law'.[77] However, Ovey and White note that for Article 7 ECHR, 'the Strasbourg case law shows that a crime has to be very loosely defined indeed before the Court will find a violation of this provision'.[78]

As Article 1 of Protocol 1 (as amended) ECHR requires only that there be laws securing the payment of taxes, their retroactivity or otherwise is not specifically taken into account under the Convention.[79] In *National and Provincial Building Society and others v. United Kingdom*,[80] the European Court of Human Rights upheld retroactive tax legislation. It found that retroactive legislation introduced in 1991 and 1992 served to carry out the intention of the 1986 UK Parliament by filling in gaps left by the original legislation. Parliament did not act unreasonably as the legislation served a legitimate purpose. The legislation was also proportionate in that it struck a fair balance between the taxpayer and the state.[81]

Most international instruments protecting human rights take a similar approach, reserving the right to tax within the law to the member states.[82] This is reflected in domestic law. Vanistendael notes that, 'in most countries, the principle of nonretroactivity is observed not as a legally binding principle . . . but as a principle of tax policy that the legislature follows as it considers appropriate'.[83] The 1990 OECD survey, however, states that as a matter of

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76 Ibid., p. 22.

77 C. Ovey and R.C.A. White, above n. 15, p. 191.

78 Ibid.

79 *See* D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995, London, Butterworths), p. 537.

80 (1998) 25 EHRR 127.

81 Discussed in P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review*, 211, 225.

82 J. Tiley, 'Human Rights and Taxpayers' (1998) *Cambridge Law Journal* 57(2) 273.

83 F. Vanistendael, above n. 20, p. 24. The exceptions include Belgium and France, which may provide specifically for retroactivity in the tax code.

principle, tax laws should normally not be retroactive as taxpayers should know what the consequences of an action will be before taking it.[84]

The nature of tax law is such that it is difficult to legislate against retroactivity. Tax law is not restricted to a single transaction or event. It is generally applied over time and a change in the law will almost always have some past as well as future economic effect.[85] For example, it is fairly common for a government to announce in its annual budget that tax rates will change from a particular date. The legislative process can be slow where a government cannot easily command a majority in the legislature to pass its legislation and sometimes the legislation authorizing third parties, such as employers, to make deductions of tax at the new rates has not come into force by the time those deductions should be made.[86] Legally, deductions cannot be made, but if the law has retroactive effect, penalties may subsequently apply for failure to deduct. The UK extra-statutory concessions or other administrative arrangements that fudge the law are the simplest response.[87] However, it is an inappropriate mechanism and undermines the principle of legality.

Some retroactivity is beneficial to taxpayers, where it makes technical corrections to laws passed in error, clarifies the law or overturns a judicial decision that goes against past practice.[88] More commonly, tax law is passed retroactively to counter tax avoidance or to prevent taxpayers having a window of opportunity to take advantage of tax schemes between the announcement of legislation countering them and the implementation of the law.

In Australia, there is a history of aggressive tax avoidance to exploit loopholes in the law, encouraged for some years by the courts, which used a formalistic approach to statutory interpretation.[89] The Government has overcome this problem through its wide-ranging general anti-avoidance rule.[90] However, the previous culture remains of using a statutory response to any issue that may represent a risk to the revenue.[91] There is no constitutional or

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84 OECD, para. 2.21.

85 Discussed further in F. Vanistendael, above, n. 20.

86 Australia has faced this issue on a number of occasions in recent years with different taxes.

87 ATO, *Administrative Treatment of Retrospective Legislation* (Canberra, ATO, 1994), available under 'Tax Professionals', <www.ato.gov.au>, 20 October 2006.

88 V. Thuronyi, above n. 5, p. 76.

89 J. Cleary, 'The Evolution of Tax Avoidance' (1995) 5 *Revenue Law Journal*, 219 and C. Sampford, above n. 12, p. 147 *et seq*.

90 Income Tax Assessment Act 1936, Part IVA.

91 R. Vann, 'General Description: Australia' in H.J. Ault, above n. 27, p. 5, p. 10.

legal impediment to retroactive legislation of tax laws. Faced with tax arrangements that fall within the law, but which represent a risk to the revenue, the Government legislates to fill the gap in the law. This is usually given effect by announcement that legislation will be introduced in an area to achieve a particular effect. In principle, this appears to be an appropriate use of retroactive legislation.[92] Otherwise taxpayers would rearrange their affairs to take full advantage of the loophole before the legislation came into effect.

However, there is a difficulty where the legislation is produced some time later, is debated and amended, and the law can be passed even years after the announcement is first made.[93] The additional problem for taxpayers is that the legislative process can introduce laws that are significantly wider than or different from the original announcement but that has effect from the date of the original announcement.[94] From the Government perspective, there is generally broad debate in the tax profession as the law develops, so where there will be significant amendments to the original announcement, they are usually publicised at least to the tax profession even if not to the public. Nonetheless, it undermines the principle of legality, as taxpayers are forced to manage their affairs on the basis of legislation that has neither been passed and of whose precise content they are unaware.[95] In response, the Senate (Australia's upper house in a bicameral system) has adopted procedural rules to pass legislation prospectively if legislation is not introduced into Parliament within six months of its original announcement.[96]

In France, there have been a number of cases that highlight the problem of retroactive legislation against tax avoidance.[97] Where legislation has been upheld in the courts and Parliament then passes retroactive legislation to overturn the original law, it raises concerns. Cyrille argues that there should be

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92 For a discussion of the difficulties with retrospective legislation in Australia, *see* the Reports of the Scrutiny of Bills Committee, <www.aph.gov.au/Senate/committee/scrutiny>, 20 October 2006.

93 C. Sampford, above n. 12, p. 156 on 'Legislation by press release'.

94 Ibid., p. 158.

95 The case of *Gray v. FCT* (1989) 20 ATR 649, illustrates the application of a capital gains provision that was significantly different in its effect from the original announcement. To their detriment, the taxpayers entered into transactions on the basis of the announcement before the detail of the law became available.

96 Senate Resolution of 8 November 1988, reproduced in Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 1998*, <www.aph.gov.au/senate/committee/scrutiny/bills/1998/b11.htm>, 20 October 2006.

97 D. Cyrille, 'Taxpayer Protection and Tax Fines in France' in D. Albregtse and H.P.A.M. van Arendonk, above n. 1, p. 99, p. 101.

strict limits on Parliament's ability to introduce retroactive legislation to overturn earlier legislation that the judiciary has upheld as valid, particularly where the risk to revenue is minimal.[98]

In Germany, the constitution prohibits legislation where the legal consequences based on past facts are retroactive, effectively backdating a change in the law.[99] However, where the legislation applies prospectively but to facts or events that have already occurred, there may be limited exceptions.[100] Thuronyi provides a useful summary of the exceptions that might justify retroactivity:[101]

- the retroactive consequences could be considered *de minimis*;
- the law was unclear or contradictory before enactment of the legislation;
- retroactive application was required in order to correct a constitutionally defective legal rule (for example, a rule that violated the principle of equality);
- retroactive application was required because of 'urgent requirements of the public interest'.

Sweden takes a similar strong line against retroactivity[102] and this is mirrored in a number of other jurisdictions.[103]

Others take a completely different view. Croatia has a history of retroactive regulation,[104] as do Australia[105] and the United States. In *United States v. Carlton* the Supreme Court found that the retroactive legislation in question was acceptable as it fulfilled a legitimate legislative purpose, was reasonable, the means were rational and the amendment was neither illegitimate nor

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98 Ibid.

99 C. Daiber, above n. 24, p. 159.

100 Ibid.

101 V. Thuronyi, above n. 5, p. 80.

102 A. Hultqvist, above n. 33, p. 300 and R. Persson-Österman, 'Human Rights in the Field of Taxation: a view from Sweden' (1999) 2 *The Cambridge Yearbook of European Legal Studies*.

103 V. Thuronyi, above n. 5, p. 81 notes that specific constitutional protection exists in Brazil, Greece, Mexico, Mozambique, Paraguay, Peru, Romania, Russia, Slovenia and Venezuela.

104 H. Arbutina, above n. 23, p. 139.

105 Although retroactive statutes are permissible, the courts will generally resist their retrospective application unless the statute clearly intends it, *see MacCormick v. FCT* (1984) 15 ATR 437.

arbitrary.[106] It was found to be reasonable for Congress to prevent loss to the revenue by imposing a tax on taxpayers entering into purely tax-motivated transactions that took advantage of an uncorrected law.[107]

Given the divergence in approach by sophisticated tax regimes, a model must take a consensual approach to gain acceptance. The best outcome for taxpayers would be for jurisdictions to adopt the German or Swedish constitutional models. However, a less stringent approach is acceptable provided it includes safeguards. This is the point where countries that do allow retroactive legislation have sometimes allowed pragmatism to overcome the basic principles that underpin the rule of law. The urgency to pass legislation has tended to supersede good legislative practice.

A compromise may be found in the review of legislation by a parliamentary scrutiny committee of a kind discussed in Chapter 5. It is interesting to note that one of the primary focuses of the Australian Senate Standing Committee for the Scrutiny of Bills in relation to tax legislation has been on the dangers of the potential retrospectivity of such legislation. Where amendments are technical and have no financial effect, they are accepted. However, where there is potential for the retrospective imposition of liabilities, the Committee draws it to the attention of the relevant minister and seeks advice either that this is not the effect of the law or that it is indeed the intention of the law.[108] It requires a response from the minister and ensures that retrospective legislation is not introduced unintentionally or without very good reason (the sanction in Australia being that it would otherwise be raised in the Senate debate on the bill).

Sampford endorses the approach to retrospective legislation taken by the Queensland Legislative Standards Act 1992 (Qld),[109] which requires a scrutiny committee to ensure that:[110]

- The purposes of legislation are defined.
- The means identified are defined.
- The proportionality of the means to that end are considered.
- Drawbacks are identified.

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106 Discussed in V. Thuronyi, above n. 5, p. 78.

107 Ibid., p. 79. *See, however*, Public Law 1-4-168 30 July 1996 (H.R.2337), Title XI — Relief from Retroactive Application of Treasury Department Regulation, s. 1101.

108 For example, *see* Senate Standing Committee for the Scrutiny of Bills, *First to Fifteenth Reports of 2003* (Commonwealth of Australia 2003), p. 220.

109 <www.austlii.edu.au>, 20 October 2006.

110 C. Sampford, above n. 12, p. 281.

– Alternatives to legislation are considered.
– The supporting measures are considered.

Delegated legislation and administrative discretion should be subject to similar rules governing retroactivity. In most cases the governing legislation would prevent retroactive application of delegated legislation or administrative discretion prior to the date of effect of the governing legislation. However, the detailed interpretation of the governing law may require the implementation of rules by the authorized delegate from time to time that could take effect retroactively.[111]

Administrative discretion may also change over time. In the context of tax avoidance in particular, discretion may be exercised to change the interpretation of the law by the revenue authority. This may include changes in accepted interpretations of court decisions, where the revenue authority believes that taxpayers are exploiting the existing interpretation for tax avoidance purposes.[112] Although there are often no explicit safeguards for taxpayers against retroactive application of delegated legislation and administrative discretion, adopting similar safeguards to those applicable to the governing legislation is unlikely to be contentious.

D. Certainty

The issue of certainty covers a number of considerations across legislation, application and adjudication. Often, the rules or practices that try to smooth the technical difficulties that arise in the law from time to time are not articulated clearly enough. This can create more problems than it solves. It is therefore important to identify and articulate in the tax context, the operational rules that allow the law to work effectively and provide taxpayers with the required certainty.[113] Quite often these will be rules of interpretation.

The European Court of Human Right's consideration of the requirements for a valid limitation on rights under the ECHR is relevant. The imposition of

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111 Internal Revenue Code § 7805.

112 For example, in Australia, the long-accepted rules governing professional service trusts have been changed by the ATO to counter what they judge to be substantial exploitation of those rules to avoid tax. *See further*, G.S. Cooper, 'Service Entities' (2006) 40 *Taxation in Australia*, 592 and Taxation Ruling TR 2006/2, <www.ato.gov.au>, 1 November 2006.

113 IMF Code, above n. 44, 1.2.2 and the explanation, pp. 18-20.

tax is a similar class of law to a restriction on a protected right. In the *Sunday Times* case,[114] it was held that a norm must be formulated:[115]

> with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

The Court has not required a level of specificity that precludes the need for interpretation.[116] However, the law must be reasonably certain. The requirement of reasonableness underpins much of the analysis below and reflects the OECD expectation.[117]

An associated difficulty that can undermine certainty is that of complexity. As stated in Chapter 3, tax rules should be as clear and simple to understand as the complexity of the subject of taxation allows. Prebble argues that tax law is necessarily complex because of the nature of modern transactions and their legal treatment and can verge on the incomprehensible.[118] The problem can be made worse, as some jurisdictions persist in using archaic rules of drafting that serve to make even simple laws seem incomprehensible.[119] The difficulties in making tax law simple is discussed in Chapter 3. Hopefully, best practice in drafting will flow from the other rights. It is difficult to legislate.

E. Understandable rules

A right that should exist in all jurisdictions, but that regrettably does not, is the requirement that tax laws should make sense. It is assumed that they do,

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114 *Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A, No. 30; (1979-80) 2 EHRR 245.

115 Ibid., para. 49.

116 C. Ovey and R.C.A. White, above n. 15, p. 201.

117 OECD, above n. 1, para. 2.21.

118 *See* J. Prebble, 'Why Is Tax Law Incomprehensible?' (1994) *British Tax Review*, 380. The theme is also explored in G.S. Cooper, 'Themes and Issues in Tax Simplification' (1993) 10 *Australian Tax Forum*, 417 and W.G. Gale and J. Holtzblatt, 'The Role of Administrative Factors in Tax Reform: Simplicity, Compliance and Enforcement' (Social Science Research Network, 11 February 2000), SSRN, <ssrn.com/abstract=208289>, 6 September 2006, or DOI: 10.2139/ssrn.208289.

119 Discussed at length in V. Thuronyi, 'Drafting Tax Legislation' in V. Thuronyi, above n. 20, ch. 3.

often incorrectly. It is important that taxpayers should be able to understand the tax law, albeit with professional assistance.[120]

One of the particular problems with the common law system is that there is a presumption that laws have meaning. There are rules of statutory interpretation that require judges to interpret the law to find the least absurd meaning where the ordinary meaning of the law does not make sense. In tax legislation this leads to the anomalous situation that taxpayers are supposed to second-guess what meaning judges will read into a provision, where its ordinary meaning is not clear. The problem is more acute, in that it is often broad, catch-all provisions that attempt to act as a stop-gap in tax legislation that are poorly drafted.

An Australian example concerned the notorious 'Terrible Twins' of the capital gain and loss provisions.[121] Where no other provision applied, the language of these two subsections sought to deem a transaction to have occurred that would then be subject to the capital gains provisions. The legal concepts that had to be dealt with to achieve this in a couple of paragraphs proved too much. No-one knew exactly what they meant. When a case considering their application finally reached the full High Court[122] of seven judges they gave a number of different judgments that differed in turn from those given by the lower courts. The Chief Justice noted the judges' inability to reach a common understanding and said of the subsections:[123]

> They must be obscure, if not bewildering, both to the taxpayer who seeks to determine his or her liability to capital gains tax by reference to them and to the lawyer who is called upon to interpret them.

Where there is a provision that is obscure, bewildering or absurd, and judges interpret it, they thereby provide it with meaning. That meaning then becomes its meaning from when it was first introduced. Taxpayers who have arranged their affairs on the basis of an alternative interpretation (that may have been put forward by the revenue authority prior to the judgment) could experience significant commercial losses. It is an extension of the problem of retroactive legislation. Instead, if a provision is absurd or does not make sense, judges should interpret it in favour of the taxpayer, or order that it does not apply for lack of meaning, and the responsibility should rest with the legislature to amend the provision.

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120 OECD, ibid., para. 2.21. and IMF Code, above n. 113.

121 Income Tax Assessment Act 1936 (Cth), subss 160M(6) and (7).

122 Australia's highest court.

123 Sir Anthony Mason CJ in *Hepples v. FCT* (1991) CLR 492, 497.

The ordinary meaning of the tax rules should be clear and comprehensible. Where the courts find that it is not, the legislature or its delegate has the responsibility to amend the relevant provision. Taxpayers should not suffer the application of an interpretation that leaves them worse off than an equally plausible interpretation of the rule. In the same way, where the revenue authority finds that the interpretation of the law is uncertain in its application, it should have discretion to take test cases to the courts. This would normally only be feasible as a standard approach in a sophisticated tax system. It is therefore a recommended right.

Litigation of test cases promotes certainty in grey areas of the law, particularly in areas of concern to a large number of taxpayers, or to a particular sector.[124] A revenue authority should identify the criteria for choosing test cases. In a recent review of the ATO litigation programme, the Australian Inspector-General of Taxation made recommendations that are apt in any jurisdiction.[125] Accordingly, drawing on these recommendations in relation to litigation generally and test case litigation in particular, as part of the recommended right: the revenue authority should set out its litigation philosophy, approach and policy; there should oversight by a senior officer of the revenue authority to ensure consistency in management of the programme; risk management techniques should apply to tax litigation issues; there should be independent input into the litigation programme; the revenue authority should fund taxpayers' expenses in defending all cases where the revenue authority has been unsuccessful at any stage of the litigation; and the revenue authority should communicate the application of finalized court and tribunal decisions in a standard form. The right is most effective where taxpayers have input into the cases chosen through some form of advisory process.

Where a rule is absurd, ambiguous, contradictory, or does not make sense, it places the revenue authority in a difficult position if it is to apply the law. Providing that where there is such a provision, the revenue authority as well as adjudicatory bodies may apply it to the taxpayer's benefit prevents anomalous

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[124] The ATO has a budget line dedicated to funding a test case litigation program where taxpayer costs are funded. It focuses on litigation, where the outcome is likely to resolve taxation issues that are important to the general administration of the tax system through the creation of legal precedent, 'Test Case Litigation Program', <www.ato.gov.au>, 1 November 2006. Funding is limited and cases chosen tend to have wide application.

[125] Inspector-General of Taxation, *Review of Tax Office Management of Pt IVC Litigation* (Canberra, Inspector-General of Taxation, 2006) para. 2.43-2.69.

results. It also reduces the need for extra-statutory concessions of the kind that are used in the UK.[126]

F. Contradictory rules

A right that is more often found in tax systems, is that rules should not be contradictory. Two rules that appear to contradict one another leave the taxpayer in a position of uncertainty. In most jurisdictions there are procedures that allow an interpretation to be given by the courts that avoids uncertainty. However, if a taxpayer can show that the application of the law is to the taxpayer's disadvantage, then it should be interpreted in the taxpayer's favour. It may be unfair that an interpretation chosen by a court to avoid contradiction between rules is different from an equally plausible interpretation of the law relied on by the taxpayer.

Statutes tend to overcome this difficulty by including interpretation provisions.[127] Otherwise, a later act normally prevails over an earlier act. Usually, a jurisdiction will have a separate act governing the interpretation of statutes.[128]

G. Rules that cannot be obeyed

A similar problem arises where rules cannot be obeyed: they require conduct that is beyond the powers of the affected party. For example, legislation may require a taxpayer to provide information about a company in which the taxpayer has invested on the basis of deemed control.[129] This creates a problem where the company is in another country and the taxpayer cannot gain access to that information under the laws of that other country. In other situations, legislation may require the taxpayer to pay tax on income that the taxpayer is deemed to have received, but to which the taxpayer is denied access by

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126 A. van Rijn, above n. 32. This rule overcomes the concern over rules that are not obeyed in their application.

127 *See* Chapter 5 on enforcement of legislation.

128 In Australia, Acts Interpretation Act 1901 (Cth); United Kingdom, Interpretation Act 1978 (UK); Canada, Interpretation Act (R.S., 1985, c. I-21).

129 For example, under Controlled Foreign Corporation or Foreign Investment Fund provisions.

law.[130] It is unfair in such cases to penalise the taxpayer for non-payment or extended payment and the law should allow relief. In most cases, it would be administrative relief, but the revenue authority may require additional legal authority to provide it. In such cases, it is reasonable that the onus should rest with taxpayers to prove that they cannot obey a law.

Care should be taken in introducing such a rule where it is likely to lead to abuse. There should be clear and narrow limits on the exercise of such discretion. It should be subject to the approval of the most senior officers of the revenue authority and to an annual reporting and external audit process.

H. The right to pay no more than the correct amount of tax

A tax system should operate on the basis that taxpayers need only pay the amount of tax required by law. Taxpayers that overpay tax should be entitled to a full refund and, ideally, interest should be paid on the overpayment. The tax authority should be under an obligation to inform taxpayers if it finds that they are entitled to tax relief, deductions or refunds that the taxpayers have not claimed.[131]

Although this is an issue of assessment, it is fundamental to the principle of certainty and requires particular protection to ensure that tax rules are not arbitrary. Revenue authorities are the means by which governments exact tax from their citizens. They are in a better position than the taxpayer to understand the rules of the tax system. If taxpayers make errors in the government's favour, it is the duty of a revenue authority to correct those errors.[132]

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130 In Australia, one interpretation that the courts have given to the rules taxing trusts can lead to a beneficiary, who is a life tenant, paying tax on income that is corpus of the trust, when that income will never come to the beneficiary and will ultimately be distributed to a remainder man. An analogous position can arise where a taxpayer has assets that have been frozen in a foreign jurisdiction and the taxpayer has to pay tax on the income from the frozen assets that are taxable in the taxpayer's country of residence, even though the taxpayer cannot access the income to pay the tax.

131 This would not be the case if the relief, deductions or refund were optional and the taxpayer had chosen not to exercise that option. In other words, it is not the responsibility of the tax authority to act as a tax planner for the taxpayer. *See further*, OECD, above n. 7, para. 2.20.

132 Discussed in the EU context by J. Malherbe, 'Does it work and how does it work? A Belgian view' in D. Albregtse and H.P.A.M. van Arendonk, above n. 1, p. 27, p. 29.

I. The right not to be taxed twice

Generally, tax systems should be designed to avoid double taxation and, in most cases, they are. Taxpayers should not be taxed twice on the same income. Where unforeseen anomalies occur in legislation, so that double taxation occurs, taxpayers should be able to obtain relief from the courts without needing to wait for amending legislation. It is more difficult to protect taxpayers from double taxation at the international level. Double tax agreements attempt to do so, but it is unrealistic to expect taxpayers to be able to claim general relief in domestic courts from international double taxation.

J. Non-discrimination

One of the most important rights in any tax system is the right to equal treatment or non-discrimination. Based on the principle of equity and fairness outlined in Chapter 3, it is also very difficult to apply in the tax context in its broad sense. Article 26 ICCPR states that 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. Although considered primarily in the context of the rights specifically provided for in the Covenant, the non-discrimination article provides in itself an autonomous right.[133]

From Chapter 3, a basic principle of tax law design is that it should treat people in similar circumstances in the same way (horizontal equity) and ensure that tax is allocated fairly between people in different circumstances (vertical equity). To what extent can the right to equal treatment or non-discrimination apply to this principle? It has been found that a system of progressive taxation does not violate Article 26.[134] It has also been held that there is an objective distinction to be made between higher and lower income and the aim to achieve a more equitable distribution of wealth is both reasonable and compatible with the aims of the Covenant.[135] This allows fairness or vertical equity into the principle of non-discrimination.

The jurisprudence on Article 26 ICCPR has focused heavily on horizontal equity issues in non-tax matters.[136] The test is whether the discrimination is

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133 S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, (Oxford, OUP, 2000), p. 524.

134 S. Joseph et al., above n. 133, p. 526

135 Ibid.

136 Ibid., p. 519.

based on reasonable and objective criteria.[137] An additional consideration is that distinctions that were reasonable and objective at the time of enactment of legislation, remain so in a changing society.[138] Negative effects on an individual or group of individuals are not necessarily discriminatory.[139]

Both points are important in the tax context. Obscure tax rules can remain in place despite the fact that the economic or social reasons for their implementation have long disappeared. Sometimes political lobbying will ensure that they are at the forefront of current awareness and are retained. At other times there is no reason or support for their retention. In such cases legislation should provide taxpayers suffering discrimination standing to question the rules' continuing validity. The second point is a necessary distinction in the context of tax rules, where the introduction of a rule often produces negative effects or less beneficial effects to at least some taxpayers.

Article 14 ECHR provides a more detailed jurisprudence on non-discrimination in response to the breadth of its jurisdiction. Unlike Article 26 ICCPR it does not have autonomous effect and therefore has little effect on tax matters.[140] However Protocol 12, although phrased in terms of a prohibition on discrimination, effectively provides a right to equality. It is likely to have a wider impact on tax matters in that it focuses specifically on discrimination by a public authority in the exercise of discretionary power and by any act or omission.[141] The methodology used by the European Court of Human Rights in examining non-discrimination issues under Article 26 is useful.

Once it has reviewed whether the complaint falls within a protected right and there is violation of a substantive provision, the Court examines whether there is different treatment.[142] The *Chassagnou* case highlighted that the applicant must show there has been different treatment and, once this has been done, the respondent Government must show that different treatment is justified.[143] In identifying difference, the groups must be

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137 Ibid.

138 Ibid.

139 Ibid.

140 *Abdulaziz, Cabales and Balkandali v. United Kingdom*, Judgment of 28 May 1985, Series A, No. 94; (1985) 7 EHRR 471, para. 71.

141 C. Ovey and R.C.A. White, above n. 15, p. 358. It came into force on 1 April 2005.

142 For a comprehensive analysis of the Court's methodology, *see* C. Ovey and R.C.A. White, ibid., p. 352.

143 *Chassagnou and others v. France*, Judgment of 29 April 1999; (2000) 29 EHRR 615, para. 91 and 92.

comparable.[144] For indirect discrimination, the groups must show that although the same requirement applies, 'a significant number of one group is unable to comply with the requirement'.[145]

It is generally straightforward to identify different treatment between taxpayers. Tax policy focuses extensively on the difficulties in balancing competing objectives.[146] That is why there is such a wide margin of appreciation given to Contracting States of the ECHR and other human rights instruments in tax policy.[147] The critical factors in any determination of discrimination or inequality is whether the different treatment pursues a legitimate aim and whether the means employed are proportionate to the legitimate aim.[148]

Policy determines whether companies are taxed differently to partnerships, trusts or sole traders although they are carrying on similar businesses. Social policy determines the levels of relief available to taxpayers for dependents of different kinds. Yet, to treat taxpayers in the same position differently would undermine the effectiveness of the tax system. Germany has taken the concept one step further. It was found to be unconstitutional to impose a different tax burden on real estate as compared to other forms of property, as it breached the principle of equality before the law.[149] The same decision held that a total tax burden imposed on a taxpayer that exceeds approximately 50 per cent of the total return typically derived from the taxpayer's property is a violation of the constitutional right of free disposition of property. These concepts open interesting new areas for consideration and may be an indication of how this right will expand in jurisdictions other than Germany.

Thuronyi provides a wide-ranging analysis of the application of the principle of equality or non-discrimination in courts in a number of jurisdictions.[150] The German Constitutional Court clearly takes an active interventionist approach to violations of the principle of equality, and has struck down a number of taxes for breach of this rule.[151] In contrast, the US Supreme Court

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144 C. Ovey and R.C.A. White, above n. 15, p. 355 and *Fredin v. Sweden*, Judgment of 18 February 1991; (1991) 13 EHRR 784.

145 C. Ovey and R.C.A. White, ibid.

146 *See, e.g.*, K.C. Messere, above n. 4.

147 *See, e.g.*, *National and Provincial Building Society and others v. United Kingdom*, Judgment of 23 October 1997; (1998) 25 EHRR 127, para. 88.

148 C. Ovey and R.C.A. White, above n. 15, p. 352.

149 Decision of the Constitutional Court of 22 June 1995, 2 Bvl 37/91 published in Official Tax Gazette II 95, 655 *et seq.*, discussed in C. Daiber, above n. 27, p. 156.

150 V. Thuronyi, above n. 5, p. 82.

151 Ibid.

allows a significant degree of latitude in tax matters.[152] In France, an important area of intervention has been to ensure equal access to procedural rights.[153]

In all three courts, it is likely that the methodology of the European Court of Human Rights would have achieved similar results. The analysis as to whether discrimination is permissible requires an assessment of the legitimacy of the aim and the proportionality of the means. The courts in each jurisdiction are influenced *inter alia* by their own legal, political, social and economic circumstances in reaching that decision. That is how it should be and is consistent with the arguments for some recognition of cultural relativity identified in Chapter 2.[154] This approach does not necessarily undermine the concept of non-discrimination. Rather, it acknowledges that in an area fraught with policy and other arguments, the detailed content of the right will differ between jurisdictions. It also leaves it open for jurisdictions with different interpretations to include a right to non-discrimination.

K. Proportionality

The principle of proportionality has its origins in civil law jurisdictions and has a much shorter history in the common law. In the civil law tradition, the executive gives effect to the purposes of the state and the administrative law regulates the exercise of state power.[155] Administrators exercise their powers, but they are constrained by the values and principles in the law that seek to control and supervise state activities and the state's relationship with private individuals.[156] The effectiveness of the state is therefore assured, but not at the expense of the interests of the private citizen.

The principle of proportionality requires broadly that the state should use appropriate means to achieve its policy objectives. This is relevant both to taxation rules and the actions of the revenue authorities in administering the tax system. In Germany, the principle requires that the means used to achieve a revenue objective should be appropriate and necessary, impose the lightest possible burden, provide the best alternative to achieve the desired objective

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152 Ibid.

153 F. Vanistendael, above n. 20, p. 20.

154 *See further* R. Piotrowicz and S. Kaye, *Human Rights in International and Australian Law* (Sydney, Butterworths, 2000), p. 79.

155 R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford and Portland, Hart Publishing, 2000), p. 12.

156 Ibid.

and any resulting disadvantage must not be disproportionate to the aim.[157] It is a construction that has been adopted by the European Court of Justice as applicable to the European Union and was articulated in a similar three-part test requiring that the measures:[158]

> Are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

Use of the proportionality principle is not designed to interfere with a chosen policy goal, but to ensure that the means used to achieve it were the most appropriate.[159] In this sense it provides a most effective redress for the taxpayer when a revenue authority over-reaches its powers. It goes beyond the relatively restrictive review on the grounds of reasonableness found in common law jurisdictions,[160] to require a review of the appropriateness of the exercise of administrative power. The narrow common law reading of grounds for judicial review means that it is appropriate to include the principle of proportionality as a primary legal right, which should be legislated, even if it is only applicable to tax administration. Although common law jurisdictions are slowly adopting the principle as part of administrative law, it is by no means universal.[161]

The European Court's formulation is in respect of legislation. However, it should extend, as it does in Europe generally, to the exercise of administrative discretion. The advantage of the proportionality principle is that it is broad enough to cover a wider range of the more egregious abuses of power without requiring special grounds for review or satisfaction of particularly difficult burdens of proof often required in the common law. The Australian Federal

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157 C. Daiber, above n. 27, p. 159.

158 *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Fedesa*, Case C-331/88 [1990] ECR 1-4023, para. 13.

159 F. Jacobs, 'Recent Developments in the Principle of Proportionality in European Community Law', in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford, Hart Publishing, 1999), p. 65.

160 H.W.R. Wade and C.F. Forsyth, *Administrative Law* (8th edn., Oxford, OUP, 2000), p. 369 and R. Thomas, above n. 155, p. 78 *et seq.* It is mainly used in England in human rights cases: *see* R. Creyke and J. McMillan, *Control of Government Action* (Chatswood, LexisNexis Butterworths, 2005), p. 742.

161 R. Creyke and J. McMillan, ibid., p. 741 *et seq.*

Court, for example, would not have needed to find abuse of power in *Edelsten v. Wilcox*,[162] in which the Commissioner exercised his discretion to require almost 100 per cent of a doctor's income to be used to pay a tax debt, which was also under appeal. The measures used were neither appropriate nor proportionate to achieve the legitimate aim. The civil law formulation of the principle was to protect the legitimacy of the exercise of legislative and administrative power.[163] As discussed in earlier chapters, there is often no greater need in respect of tax law and administration.

III. Conclusion

This chapter begins by emphasising that primary legal rights go to the heart of the legal system. Using Fuller's eight criteria for valid law as a starting point, it expands on the criteria for valid law with a focus on tax law. Simply because tax is critical to the operation of government does not mean that it is beyond the law. Caveats on the normal operation of the law used to support the operation of the tax system undermine the legal system itself. It is not appropriate to have requirements for valid law applicable only to certain aspects of the law. Just as derogations from human rights instruments are frowned upon except in the most extreme circumstances, so derogations from the normal operation of the legal system should not be accepted simply because tax is involved.

Once it is accepted that the tax law is not a special species of law that allows arbitrary rule-making, it is necessary to consider what the basic requirements are for the legal framework governing taxation. They are not much different to that required in other areas, but there are special emphases pertinent to tax. As discussed in Chapter 2, taxation is not generally seen as a fundamental good. It is designed to deprive citizens of their property, which is a fundamental good. However, as its purpose is widely recognized as legitimate and necessary for the continuation of society, it is important to ensure that a tax system is effective without breaching basic rights of the citizens being taxed. The primary legal rights articulated in this chapter are designed to ensure that balance is kept.

Tax laws should be imposed by law, be subject to the operation of the rule of law, and comply with principles of legality. This provides them with

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162 (1988) 83 ALR 99; 15 ALD 546.

163 R. Thomas, above n. 155, p. 14.

legitimacy. Taxpayers must know what the rules are. This requires substantial interplay between the legal and administrative rights, as publication needs to be at all levels, from the publication of rules legislated through to detailed explanation of their operation in the daily administration of the tax system. There must be careful monitoring of retrospective legislation. In some cases, it is necessary to make announcements of impending legislation to protect the fisc, particularly in cases of schemes for the avoidance of tax. However, the use of retrospective legislation should be used only to the extent available for other legislation and in compliance with the principles set out by Thuronyi, discussed above.

There should be careful management of tax legislation to allow its effective operation in accordance with the principles underlying the system discussed in Chapter 3. A tax system simply will not work effectively if its rules are uncertain, cannot be understood, are contradictory or cannot be obeyed. In most jurisdictions where such problems arise, it is not intentional. However, where the system is not constantly and consistently monitored, breaches of these rules can occur and there should be safeguards in place to protect taxpayers from those breaches.

The principles of fairness and equity are undermined if taxpayers are double-taxed, discriminated against or required to pay more than the tax due. Where this happens it is often symptomatic of a corrupt system. It can also happen where the internal safeguards are not in place to allow taxpayers redress. Where there is no redress, breaches of basic taxpayers' rights can be glossed over and ignored within the significant bureaucracy of the tax administration. The principle of proportionality tries to balance the rights of the state and the individual taxpayer. Although legal systems and tax administrations can get away with not applying these principles, it is not best practice. The Model therefore provides the rules that ensure a level of best practice to protect taxpayers, but also to ensure a tax system that operates more effectively.

Where primary legal rules do not exist to protect taxpayers they will be the most difficult to introduce, simply because they require legislation. There will always be strong defensive arguments justifying why the rules are unnecessary. Nonetheless, best practice suggests that they should be legislated.

CHAPTER SEVEN

Tax Administration and Administrative Charters

I. Introduction

The regulation governing tax administration usually determines the structure of the tax system and sets up a tax authority. The rights outlined in Chapters 7 and 8 are often expressed as limitations on its powers. The regulation setting up the tax authority normally also provides it with general powers of administration of the tax system. An understanding of the scope and extent of these general powers will often dictate the way a taxpayer complies with the tax laws. There is a substantial body of literature analysing the inter-relationship between: the revenue authority's exercise of its powers; the civil law, criminal law and purely administrative sanctions available to enforce those powers; and taxpayer compliance.

The relationship between the exercise of administrative powers and voluntary compliance was discussed in Chapter 2. It is outside the scope of this book to examine the links between taxpayer compliance and civil and criminal sanctions.[1] It is the exercise of the powers of administration and the procedures to effect compliance and impose sanctions that are the focus of this chapter and the next.

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[1] Discussed in R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, (ed.), *Comparative Tax Law* (The Hague, Kluwer Law International, 2003), p. 95, p. 117. Gordon's chapter provides a detailed discussion of this important issue with extensive reference to the relevant literature.

The legal framework for tax administration will necessarily depend upon the broader legal framework and the administrative structure of that jurisdiction.[2] As with all comparative legal analysis it is quickly evident that there are many similarities across jurisdictions. However, these cannot be taken at face value, as local nuances may change the nature and meaning of what on the surface seem alike. The difficulties of cross-jurisdictional interpretation were discussed in Chapter 3. However, a general framework is appropriate and arguably the best form is one organized along functional lines. This is the approach taken in Chapters 7 and 8.[3] As discussed in Chapter 4, the functional approach also determines the type and enforcement of taxpayers' rights.

The more power and discretion left in the hands of the revenue authorities, generally the greater the proportion of administrative rights. This is prevalent in common law jurisdictions. Many civil law jurisdictions provide a more detailed legislative content to the administration of the tax system and therefore to taxpayers' rights; the corollary being a reduction in the discretion of the revenue authority. As illustrated in Chapter 5, the nature of rights changes depending on how they are enforced. The analysis in the next two chapters therefore does not favour a particular style of enforcement, but provides an indication of the differences in content that can occur between secondary legal rights and primary and secondary administrative rights and principles of good practice.

It is important to note that 'content' does not necessarily mean that rules are spelt out in detail. That is a product of the common law, where principles, such as those set out in Chapter 6, have largely come late to the tax system. Grbich[4] argues forcefully that the civil law concept of providing in legislation the 'core principles and very basic conceptual tax framework'[5] gives a degree of legal certainty that reduces significantly the scope of administrative discretion. It does so without necessarily demanding the comprehensive and detailed technical rules covering every eventuality that are so often found in common

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2 F. Vanistendael, 'Legal Framework for Taxation' in V. Thuronyi, ibid., p. 15 provides an analysis of the distribution of tax law making power between the legislative and executive branches of government and between central and local governments.

3 Discussed extensively and strongly recommended in R.K. Gordon, above n. 1, p. 97, which should be given particular weight as it is based on significant experience in designing tax legislation in a range of jurisdictions.

4 Y. Grbich, 'New Modalities in Tax Decision-Making: Applying European experience to Australia' [2004] eJTR 7; (2004) 2 *eJournal of Tax Research*, 125, <www.austlii.edu.au/au/journals/eJTR/2004/index.html>, or by free subscription, <www.atax.unsw.edu.au/ejtr/>, 3 November 2006.

5 Ibid., p. 142.

law jurisdictions.[6] However, the thrust of Grbich's argument, which is made in the context of harmonisation of European tax law, underlines the difficulties in applying the content of one jurisdiction's rules to another. The analysis of rights in the next two chapters is therefore broadly framed to capture the general principles applicable across jurisdictions.

The nature of the tax system determines where taxpayers' rights are found. Primary and secondary legal rights are usually found in a range of legislation. Some rights are given constitutional protection of a kind discussed in Chapter 6. Others, such as appeal rights and the jurisdiction of courts can be found in administrative law. Some are found in special legislation governing particular subject matter, such as freedom of information legislation. Most are included in those codes, rules or statutes dealing specifically with taxation, whether they form part of public administrative or procedural law (often in civil law jurisdictions) or sit rather uncomfortably as a branch of public law (usually the case in common law jurisdictions).[7]

The nature of tax law means that there is overlap in any jurisdiction and some aspects of tax administration are governed by a completely different set of rules. The most obvious example is where criminal offences apply to acts in connection with taxation and the criminal law and procedure take precedence over administrative law or the ordinary tax law. The seriousness of criminal charges can introduce generic elements of protection that are not available under general administrative, procedural or tax-specific provisions. They form important elements of the analysis below, but the focus is limited as far as possible to the effect of these provisions on taxpayers.

Gordon suggests that although it is best not to provide special rules only for tax matters where the general laws are applicable and effective, it can be beneficial 'to modify existing law to fit the unique problems inherent in tax administration'.[8] Taxpayers' rights often do fall into this category and are specific

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6 *See, e.g.*, J. Prebble, 'Why is Tax Law Incomprehensible?' [1994] *British Tax Review*, 380; G.S. Cooper, 'Themes and Issues in Tax Simplification' (1993) 10 *Australian Tax Forum*, 417; and D. Bentley, 'Ten Years of the *Revenue Law Journal*: A Diary of Tax Reform' (1999) 11 *Bond Law Review*, 192.

7 For country examples *see* D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998) and H.J. Ault, *Comparative Income Taxation: A Structural Analysis* (London, Kluwer Law International, 1997). A discussion of the approach taken in different legal systems can be found in V. Thuronyi, V. Thuronyi (ed.), above n. 1, ch. 4 and *see also* para. 6.3 on the organization of tax administration law.

8 R.K. Gordon, above n. 1, p. 99.

to the tax law. Where they have general application to all areas of tax law and administration, Gordon argues that there are important benefits to collecting them in one place within the tax code or primary tax statute.[9] The benefits include ease of access, that they need not be repeated in each section where they apply, and improved uniformity in design and application.[10] The same principles apply to collection of administrative rights in one place and support the use of administrative 'charters' or bills of taxpayers' rights.[11]

II. General powers of administration

A. Autonomy of the revenue authority

Fundamental to the operation of the tax system and its administration is that there should be an administrative body charged with the administration of the tax system independent from external interference.[12] The head of the revenue authority should therefore be in the position of sole responsibility for tax assessment, collection and enforcement, thereby assuring her or his independence.

Concomitant with this level of independence for the head of the revenue authority come high levels of accountability, which are dealt with in the following sections.[13] A basic guarantee of independence can be found in a fixed term of appointment. Bersten notes that this applies to the Australian Commissioner of Taxation, who is appointed for a term of seven years.[14] The appointment is by the Governor-General on the advice of the Prime Minister. But as the term of appointment exceeds that of the Federal Government, it

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9 Ibid. *See also* V. Thuronyi, above n. 7, para. 6.3.

10 R.K. Gordon, ibid.

11 Often more realistically termed 'service standards'.

12 Fiscal Affairs Department, *Manual on Fiscal Transparency* (Washington DC, IMF, 2001) 1.1, identifies as a fundamental principal, the clarity of roles and responsibilities in government. This point is discussed further below. The Manual is also available at <www.imf.org/external/work.htm>, 1 November 2006, (IMF Code).

13 For an excellent analysis of the principles underlying the independence and accountability of the head of a revenue authority, *see* M. Bersten, 'Independence and Accountability of the Commissioner of Taxation' (2002) 12 *Revenue Law Journal*, 5 in the context of the Australian Commissioner of Taxation.

14 Ibid., p. 15.

precludes the politicisation of the role: a change in government does not bring with it the right to change the Commissioner.[15] The US Commissioner of Internal Revenue similarly is appointed by the President by and with the consent and advice of the Senate for a five-year term under § 7803 *Internal Revenue Code*.

This principle that the head of the revenue authority has security of tenure, adds to her or his independence. It is important that the scope for removal is limited. Australia restricts removal to instances of proven misbehaviour, mental or physical incapacity, bankruptcy, unapproved paid employment outside the duties as Commissioner, or absence without leave.[16] The US allows removal, however, at the will of the President.[17] Interestingly, Canada has not seen the need to establish details of the position of Commissioner by legislation. The Income Tax Act (RSC 1985, c 1 (5th Supp)) simply states at Section 220:

> (1) The Minister shall administer and enforce this Act and the Commissioner of Customs and Revenue may exercise all the powers and perform the duties of the Minister under this Act.
> (2) Such officers, clerks and employees as are necessary to administer and enforce this Act shall be appointed or employed in the manner authorized by law.
> (2.01) The Minister may authorize an officer or a class of officers to exercise powers or perform duties of the Minister under this Act.

Given the experience in developing countries discussed below, this is an instance where the inherent stability and democratic traditions of some democracies plays against them. They do not offer explicit protection of the independence of the position of the head of the revenue authority. Tenure is not assured. Removal can in theory be at the whim of the executive arm of government. Best practice suggests that protection should be put in place. Without protection, there is a danger, however remote, that the tax administration could be administered by an appointee beholden to the political will of the executive.

The reporting relationship of the revenue authority within the executive branch of government is also critical to its independence. The reporting relationship can influence the revenue authority's focus and its method of

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15 Ibid. The Senate term is six years and the House of Representatives only three years in Australia.

16 Taxation Administration Act 1953 (Cth), s. 6C.

17 § 7803(a)(1)(C) *Internal Revenue Code*.

operation.[18] To counter this, some jurisdictions, such as Montenegro, have placed the tax administration outside the control of a particular ministry, reporting directly to the Executive.[19] This follows the example of countries such as Australia and Canada, where the ATO and Canada Revenue Agency (CRA) report directly to a Minister. However, in countries such as the United Kingdom, where Her Majesty's Revenue and Customs (HMRC) falls within the broader responsibility of the Chancellor of the Exchequer, and the United States, where the IRS is a bureau of the Department of the Treasury, there is little practical difference in the independence of the revenue authority.

The extent of a revenue authority's autonomy and the powers given to it generally 'reflect underlying differences in the political structures and systems of public sector administration in countries, as well as longstanding historical practice'.[20] In the OECD, for example, it was found in 2006 that just over half of its members had established unified authorities with some degree of autonomy.[21] However, those authorities that comprise single or multiple directorates in the relevant Ministry of Finance do not necessarily thereby lose their independence. The discussion below will demonstrate that it is the substance of independence that is important rather than an organisational form. The 2006 OECD comparative survey does note that autonomy includes some or all of: the power to interpret tax laws; the authority to impose penalties and interest; responsibility for the internal organisation and management of tax operations, including budgetary discretion; responsibility for information technology associated with tax administration; the discretion to establish performance standards; and responsibility for personnel.[22] It is beyond the scope of this book, but it would be useful to explore through detailed case study which powers and responsibilities should be given to a revenue authority as a matter of priority to best establish its independence. So many revenue authorities have now undergone substantial reform either unilaterally or with external assistance, that there would be sufficient material for analysis.

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18 *See, e.g.*, K. Ishimura, 'The State of Taxpayers' Rights in Japan' in D. Bentley, above n. 7, p. 227.

19 P. Goranovic, 'Taxpayers' Rights and Tax Administration in Montenegro', p. 9, <unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan004534.pdf>, 2 November 2006.

20 OECD Committee on Fiscal Affairs, *Tax Administration in OECD Countries and Selected Non-OECD Countries: Comparative Information Series (2006)* (Paris, Centre for Tax Policy and Administration, 2006), p. 9.

21 Ibid., and Table 1, p. 31.

22 Ibid., pp. 11-12.

Not all jurisdictions have clear delineation of roles and it is worth identifying how independence should be achieved where a revenue authority either falls within a Ministry or has its own minister. It was clearly articulated in Australia by the then Minister for Revenue and Assistant Treasurer:[23]

> Of course, the Commissioner of Taxation has absolute autonomy in the actual administration of the tax laws.
>
> Perceptions of a non-partisan administration of the taxation laws are as fundamental to successful tax systems (and hence successful government) as are non-partisan judicial systems to the rule of law and sustaining a democratic society.
>
> For this and other reasons, the Commissioner of Taxation has - and will continue to have - absolute discretion in the day to day administration of the tax laws.
>
> At the same time, democratic government is held accountable by society for the taxation system that it imposes and so must be able to deliver a system that accords with democratically expressed preferences.
>
> This is the part of tax administration that is within the Government's domain - tax administration policy - and this is my challenge as Minister for Revenue.
>
> The Government's roles in tax administration include:
>
> – putting in place a robust tax design framework that generates tax laws that are unambiguous, responsive to the legitimate concerns of taxpayers, and conducive to effective administration;
> – adequately resourcing the tax administration function; and
> – ensuring that appropriate accountability and review mechanisms are in place to identify and remedy any problems in tax administration.

The distinction of roles between the executive and the revenue authority becomes more important in countries where the rule of law is not as well established. Any form of separation of authority becomes a useful means to increase transparency simply by virtue of the requirement to share information among a wider group. Even this is predicated on the assumption that the tax

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[23] Senator the Hon. H. Coonan, Speech to the Challis Tax Discussion Group (Sydney, 26 July 2002), p. 1, <assistant.treasurer.gov.au/atr/content/speeches/2002/010.asp>, 4 January 2006.

system is not simply an instrument of executive authority, which entrenches the systemic opportunity to act arbitrarily. At the point where application of the rule of law and observance of the constitution become uncertain, no structural measures will have much effect in protecting taxpayers' rights.[24] However, with increasing recognition of the rule of law, any incremental measures to protect the autonomy of the tax system and its administration are also likely to enhance taxpayer protection.[25] This is particularly so, given the recognition in those jurisdictions where the revenue base is under threat, that revenue collection will only increase if it is perceived as fair by the taxpayers. It was and remains a notable component of the strategy of the Pakistan Central Board of Revenue.[26] The Tanzania Revenue Authority, as part of its effort to reform its tax system has identified its mission, 'To be an effective and efficient tax administration which promotes voluntary tax compliance by providing high quality customer services with fairness and integrity through competent and motivated staff'.[27]

Even in a country such as Zimbabwe, suffering from democratic and economic collapse, the Zimbabwe Revenue Authority has maintained as its banner headline on its website, 'Transparency, Integrity, Fairness: We are here to serve'.[28] It underscores the fact that revenue authorities are generally aware of how important transparency, integrity and fairness are to effective tax administration, compliance and enforcement. Their independence from any autocratic or corrupt exercise of power by government is a critical first step in

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24 *See* the insightful discussion of the move in Tanzania from the exercise of arbitrary executive authority to programmes designed to restore internal and external respectability to the operation of the tax system in F.D.A.M. Luoga, 'The Viability of Developing Democratic Legal Frameworks for Taxation in Developing Countries: Some Lessons from Tanzanian Tax Reform Experiences', *Law, Social Justice and Global Development*, <elj.warwick.ac.uk/global/issue/2003-2/luoga.html>, 5 November 2006, and L. Rakner and S. Gloppen, 'Accountability through tax reforms? Reflections from sub-Saharan Africa', in M. Moore and L. Rakner (eds.), 'The New Politics of Taxation and Accountability', *IDS Bulletin*, 33 (3) July 2002.

25 Underlined by the explanations in the IMF Code, above n. 12, and particularly 18-21.

26 'Reform of the CBR November 2001-June 2004', a paper following a workshop of the Central Board of Revenue (26-28 October 2001), <unpan1.un.org/intradoc/>, 2 November 2006, and *see* the Pakistan Central Board of Revenue website, <www.cbr.gov.pk/>, 2 November 2006.

27 Tanzania Revenue Authority, <www.tra.go.tz/index.htm>, 2 November 2006.

28 Zimbabwe Revenue Authority, <www.zimra.co.zw/>, 2 November 2006.

establishing their authority to implement those principles.[29] This highlights an important issue. There are layers in the application of the rule of law and the general principles that should underlie a tax system identified in Chapter 3.

Certain aspects of a country's legal system may be subjugated to the autocratic will of the ruling elite. However, other aspects will often remain in place while some or many of the social and economic structures of society remain operative. As has been seen in countries from Nazi Germany to Zimbabwe, contract and family law may be observed even during incidences of genocide.[30] In the same way a revenue authority could operate effectively, observing taxpayers' rights, even where there was blatant abuse of human rights. More often, it is likely that the corruption will seep down, at least to some extent, into the bureaucracy.[31] Alternatively, the bureaucracy may be more heavily infected with corruption than the higher level political and judicial organs. The aim of the Model here should be to bolster the position of those fighting against corruption and seeking to implement and enforce taxpayers' rights.

Few countries claim to be undemocratic. The opposite is the case and most undemocratic countries make a point of publicizing their democratic credentials.[32] If the Model is widely accepted and espouses basic principles of administration that reinforce taxpayers' rights, there is likely to be a similar claim by revenue authorities that they observe those principles. As noted above, the mission statements of revenue authorities, ranging from the United States to Zimbabwe, already incorporate a strong service focus. The pressure to provide service and integrity in the tax system is further driven by the demand

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[29] For an excellent history of the development of independent revenue collection as a central pillar of modern democracy, *see* N. Ferguson, *The Cash Nexus: Money and Power in the Modern World, 1700-2000* (London, Allen Lane/Penguin Press, 2001).

[30] For further information on the Zimbabwean genocide, *see* Legal Resources Foundation and the Catholic Commission for Justice and Peace, *Breaking the Silence, Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980-1989*, <www.hrforumzim.com/members_reports/matrep/matrepsumm.htm>, 4 January 2006.

[31] For a deeper analysis of this aspect of corruption *see* D. Kaufmann, M. Gonzales de Asis and P. Dininio (eds.), *Improving Governance and Controlling Corruption: Towards a Participatory and Action-Oriented Approach Grounded in Empirical Rigour* (World Bank Institute, 2001), <www.worldbank.org/wbi/governance/pubs/improving.html>, 31 October 2006. This volume represents much of the material used by the World Bank Institute in its core course on fighting corruption.

[32] There are numerous agencies charting democratic development. For a listing of many of the better recognized, *see* the Democracy Research Guide, The National Endowment for Democracy, <www.ned.org>, 1 November 2006.

for foreign direct investment. This is illustrated by a paper issued in 2003 by the American and European Union Chambers of Commerce on the need for reform of the Armenian tax system if foreign direct investment was to be sustained, let alone increased.[33] It concluded:[34]

> Moreover, in the view of almost [all] respondents, the tax administration and the implementation of the tax system in Armenia on the part of the tax authorities is inefficient, inequitable and unprofessional, with widespread corruption and harassment of foreign investors and corporations that try to abide by the laws.
>
> The key results of these weaknesses according to the participants of our survey are that:
>
> 1. Tax collection is not as high as it could or should be;
> 2. Foreign Direct Investment (FDI) into Armenia is significantly discouraged, with a very serious negative effect on the economy.

Over time it is possible that the pressure for reform to attract foreign direct investment will succeed. Alternatively, other internal and external factors identified in Chapter 4 are likely, again over time, to ensure that the tax system exhibits the principles necessary for it to operate more effectively. It is interesting to note de Jantscher and Bird's comments on Latin America that,[35]

> The 1980s — in so many ways a lost decade for a Latin America burdened with external indebtedness and characterized by macroeconomic instability — turned out to be a decade of achievement for the reform of tax administration.

Nonetheless, the experience of sub-Saharan Africa is particularly instructive in this context. As aid decreased there was an increased need to raise revenue.[36] To counter inefficient, incompetent and corrupt tax collection and with the

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33 The American and European Union Chambers of Commerce in Armenia, A Joint White Paper, *Reform of the Armenian Tax System: The Foreign Investors' Perspective* (August 2003), p. 3, <www.amcham.ge/res/ics/TaxWhitePaper.pdf>, 6 November 2006.

34 Ibid., p. 3.

35 M. Casanegra de Jantscher and R.M. Bird, 'The Reform of Tax Administration' in R.M. Bird and M. Casanegra de Jantscher (eds.), *Improving Tax Administration in Developing Countries* (Washington D.C., IMF, 1992), pp. 1-2.

36 L. Rakner and S. Gloppen, 'Tax Reform and Democratic Accountability in Sub-Saharan Africa', paper presented at an IDS Taxation Seminar, (28-29 October 2002), p. 6, <www.ids.ac.uk/gdr/cfs/activities/Taxation-Seminar.html>, 29 October 2006.

encouragement of the international donor community Rakner and Gloppen note that a number of African countries introduced semi-autonomous revenue authorities.[37] The aim was to make better paid, resourced and trained individuals responsible for revenue collection and to limit direct political intervention in collection operations.[38] This is consistent with the need for independence from political interference, transparency and accountability. Initial improvements in Uganda, Tanzania and Zambia showed increased levels of efficiency in revenue collection from existing taxpayers.[39] However, Rakner and Gloppen conclude that there remained a failure in these countries to increase revenue collection or to apply the law uniformly, which derived from a lack of political will both to cease interfering and to allow transparency and accountability within the tax administration.[40] Furthermore, even among those taxpayers paying tax there remained a lack of trust manifested in low levels of voluntary compliance.[41] Bird argues that:[42]

> A tentative conclusion might be that, to put it in extreme terms, countries that have the will, strategy, and resources to reform tax administration probably do not need independent revenue authorities and those in which these critical ingredients are lacking are unlikely to be successful even if they create such an authority.

One of the issues identified by Bird is the revenue authority's resources. A solution to the problems faced by revenue authorities in countries with very limited resources is to outsource a number of functions that are particularly costly to implement. Computerisation and the significant possibilities from developments in technology provide a major incentive to use them as much as possible in the tax administration process. However, the capital cost of

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37 Ibid., p. 8. The countries identified are Ghana (1985), Uganda (1991), Zambia (1994), Kenya (1995), South Africa (1996), Tanzania (1996), Rwanda (2000) and Malawi (2000). For a comprehensive analysis of semi-autonomous revenue authorities and their advantages and disadvantages, *see* A.J. Mann, *Are Semi-Autonomous Revenue Authorities the Answer to Tax Administration Problems in Developing Countries? A Practical Guide*, (The US Agency for International Development, 2004), <www.fiscalreform.net/research/research.htm>, 6 November 2006.

38 Ibid., p. 9. *See further*, R.M. Bird, 'Administrative Dimensions of Tax Reform', (2004) 10(3) *Asia-Pacific Tax Bulletin*, 134, 145 and IMF Code, above n. 12, 3.3.4.

39 L. Rakner and S. Gloppen, above n. 36.

40 Ibid., pp. 9-18.

41 Ibid., p. 15.

42 R.M. Bird, above n. 38.

investing in the infrastructure, together with the personnel, training, operational and maintenance costs are beyond the capacity of many countries. Ramírez Acuña and Martinez-Vazquez have identified the advantages and disadvantages of outsourcing elements of the tax administration process to the private sector.[43] Both argue that the decision-making role of a revenue authority cannot be outsourced.[44] However, the information components, in certain circumstances, can be outsourced effectively and efficiently, subject to stringent safeguards, without undermining either the integrity or the perceived integrity of the tax system.[45] As outsourcing becomes increasingly common, taxpayers need the assurance that there is no undermining of the autonomy of the revenue authority. There is a long history of tax farming in Europe.[46] It is clear from the discussion above that it is no more conducive to creating a fair tax system today than it was in 1794, when 28 tax farmers were guillotined during the French Revolution.[47]

Patronage is equally insidious in undermining the integrity of the tax system. Rakner and Gloppen note that it has seriously inhibited tax collection from corporations in Zambia.[48] It would extend to similar patrimonial systems.[49] Overcoming the problem of patronage such that members of parliament and others in executive authority do not have sufficient influence over tax administration is necessarily a hard fought issue. However, it is a requirement to ensure basic protection of taxpayers' rights. Democratic countries operate under the general principle that a member of parliament cannot also hold office as a civil servant (excluding positions as a government minister or a member of the armed forces).[50] This should also be reflected in the Model.

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43 L.F. Ramírez Acuña, 'Privatization of Tax Administration' and J. Martinez-Vazquez, ''Comments'' in M. Casanegra de Jantscher and R.M. Bird, above n. 35, p. 377 and p. 396. *See also*, G.P. Jenkins, 'Modernization of Tax Administrations: Revenue Boards and Privatization as Instruments for Change' (1994) 48 *IBFD Bulletin*, 75 and C.Y. Mansfield, 'Tax Reform in Developing Countries: The Administrative Dimension' (1990) 44 *IBFD Bulletin*, 137.

44 Ibid.

45 Ibid., particularly pp. 378-392 and p. 397.

46 N. Ferguson, above n. 29.

47 Ibid., p. 95.

48 L. Rakner and S. Gloppen, above n. 36, p. 12.

49 F.D.A.M. Luoga, above n. 24.

50 G. Carney, *Members of Parliament: Law and Ethics* (Sydney, Prospect, 2000), p. 57 *et seq.* for a history of the Westiminster system. *See also*, UK, House of Commons Disqualification Act 1975 and Commonwealth of Australia Constitution Act 1900, s. 44(iv) and (v).

Although democratic government contributes strongly to the implementation of a fair and equitable, certain and simple, efficient and effective tax system, it is not a prerequisite. If the Model is implemented, even in form only, it is likely that incrementally it will become more substantive. One of the first steps along that road is the recognition that taxation has been shown to be less effective when imposed and implemented by fiat of a narrow ruling elite. The relative autonomy of the revenue authority to administer the tax system independent from external interference is therefore a particularly important initial requirement, but it must be combined with the will, strategy and resources to be effective. The Model can only provide the framework for an effective tax system: it does not provide the political will to implement it. Independence alone, however, is insufficient. It is also necessary to make the revenue authority accountable.

B. Oversight and accountability of the revenue authority

Administration of tax law necessarily involves the exercise of direct statutory powers and the exercise of administrative discretion. The powers and discretion are usually conveniently vested in the head or heads of the revenue authority, with the power to delegate that authority.[51] In common law jurisdictions the general delegation of power can include lawmaking, provided the delegation is exercised in accordance with the delegated authority.[52] In civil law jurisdictions delegated authority is far more highly regulated. Vanistendael writes that in the European continental tradition:[53]

> This power of the executive branch of government to execute or implement the tax laws is based on a general or specific delegation of power in the constitution. Tax regulations issued under such

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[51] For example, Australia, Income Tax Assessment Act 1936 (Cth), s. 8; Canada, B.J. Arnold, 'General Description: Canada' in H.J. Ault, above n. 27, p. 25, p. 33; and New Zealand, Tax Administration Act 1994, s. 6A.

[52] For example, in the UK there is an increasing tendency to legislate broad principles to provide a 'skeletal' framework within which Ministers enact secondary legislation. H. Fenwick and G. Phillipson, *Text, Cases and Materials on Public Law and Human Rights* (2nd edn., Cavendish Publishing Ltd., 2003), p. 291 argue that this 'may also be seen as a significant erosion of parliamentary sovereignty'.

[53] F. Vanistendael, above n. 2, p. 57. *See also*, Y. Grbich, above n. 4.

> delegation of power are limited to the implementation of the law itself and are valid only within the limits of those laws. What can be determined by executive decree are matters of detail, procedure, and administration. A regulation that extended the scope of the tax law, changed its conditions, or altered the meaning of the law would have to be declared illegal and inapplicable by the courts.

In the analysis that follows it will soon become clear that these differences are seen most clearly in that taxpayers' rights in common law jurisdictions tend to be administrative rights. In civil law jurisdictions they tend to be secondary legal rights. Each right is important, but its precise nature and content must adapt to the type of jurisdiction in which it is found. That said, it will be seen that there are several areas where there can be gaps in taxpayer protection because of it. This reinforces the IMF view, based on its experience in developing countries that, in addition to the principle that all tax must be imposed by law, 'the administrative application of tax laws should be subject to procedural safeguards'.[54]

The existence of procedural safeguards is critical to the integrity of the tax system.[55] Thuronyi, based on his experience in supervising tax reform projects as Senior Counsel in the IMF, identifies six areas in tax administration that can seriously undermine its effective operation:[56]

1. Corruption among tax officials, which he describes as 'rampant in a number of developing and transition countries, with other countries occupying intermediate positions';
2. A lack of knowledge and competence of tax officials in understanding and applying the tax law;[57]
3. Low investment in the public service providing salary and conditions that cannot attract or retain competent staff;
4. Where tax officials are subject to physical danger because of their role, particularly in tax collection;
5. Where tax audits are over-formalistic in their design and administration without any probing of the legal and economic issues in a taxpayer's tax return; and
6. If tax refunds are not automatically given or are difficult to extract from the government.

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54 IMF Code, above n. 12, p. 2.
55 Ibid., 1.2.
56 Above n. 4, p. 207.
57 Discussed further in Publication of Rules in Chapter 6.

As discussed in Chapter 4 taxpayers' rights can only flourish in environments where the rule of law is observed. Luoga suggests that this is particularly so 'in the context of patrimonial systems that are prevalent in developing countries'.[58] Ghai[59] notes the concerns of foreign direct investors over unaccountable and undemocratic government, which leads to poor policy and inefficient administration.

This returns to the point that a form of taxpayers' rights is ineffective if it is not observed in the application of the tax law and its administration. However, if there are at least formal safeguards in place there is something for either or both of the tax administration and taxpayers to work towards in making the safeguards effective.

It is not within the scope of this discussion to identify the best structure for effective tax administration.[60] However, Thuronyi has raised issues particularly in relation to developing countries and countries in transition, which tie in with the discussion in the previous section. Authors such as Ishimura[61] have concerns in relation to developed countries. In the previous section we noted that it is important that the revenue authority is autonomous from political interference. This may be through the clear separation of role, function and responsibility within a government department, or through the semi-autonomous revenue authority model.

Flowing directly from the arguments supporting non-interference, it is equally essential that there is some form of external oversight as a check or balance on the role of the revenue authority.[62] The nature of this oversight will

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58 F.D.A.M. Luoga, 'Taxation in the Advent of Democratisation and Transition to Free Market Economy in Tanzania and Concerns on the Rule of Law and Human Rights', *Law, Social Justice and Global Development*, 31, <elj.warwick.ac.uk/global/issue/2002-1/luoga.html>, 6 November 2006.

59 Y. Ghai, 'Constitutions and Governance in Africa: A Prolegomenon' in S. Adelman and A. Paliwala (eds.), *Law and Crisis in the Third World* (London, Hans Zell, 1993), p. 51, p. 75.

60 For some discussion, *see* A.J. Mann, above n. 37; J. Martinez-Vazquez and A. Timofeev, 'Choosing between Centralized and Decentralized Models of Tax Administration', ISP Working Paper Number 05-02, International Studies Program, (Georgia State University, January 2005), <isp-aysps.gsu.edu/papers/ispwp0502.html>, 6 November 2006; R.R. Taliercio Jnr, 'Administrative Reform as Credible Commitment: The Impact of Autonomy on Revenue Authority Performance in Latin America' (2004) 32 (2) *World Development*, 213; and C. Vehorn and J. Brondolo, 'Organizational Options for Tax Administration' (1999) 53 *IBFD Bulletin*, 499.

61 Above n. 9.

62 IMF Code, above n. 12, is concerned largely with the independent checks and balances that ensure the integrity of government finances, including taxation.

depend on the structure of government. In some democracies, the oversight has been limited until recently to reporting annually to parliament or a responsible minister in the government. In Australia, for example, the ATO provides a comprehensive annual report to the Minister for Revenue, who has Federal Cabinet responsibility for the department and the report must be laid before both houses of Parliament.[63] In many democracies, the parliament can regularly make enquiries into the tax system through its committees, which may or may not arise out of the annual reporting process. In the US, for example, this falls under the Ways and Means Committee in the House of Representatives and the Finance Committee in the Senate.[64] In South Africa, the Portfolio Committee on Finance of the National Assembly reviews the activities of the South African Revenue Service under Section 55(2) of the Constitution.[65] This is a common approach.

Bersten raises the question as to whether this form of accountability leaves the government with enough power over the administration of the tax laws.[66] The minister responsible has no power of direction over an autonomous revenue authority.[67] The revenue authority is usually forbidden by criminal penalties from disclosing any confidential information about taxpayers to the minister.[68] However, Bersten points out that the nature of the partnership between minister and revenue authority ensures that there is sufficient leverage for each party to achieve its own requirements from the relationship.[69] On the government side:[70]

- the revenue authority budget is allocated through the parliamentary process;
- it is able to amend tax laws;
- it is able to allocate and remove administrative responsibilities from the revenue authority;

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63 Income Tax Assessment Act 1936 (Cth), s. 14.

64 J.M. Dodge, J.C. Fleming, Jr and D.A. Geier, *Federal Income Tax: Doctrine, Structure, and Policy* (3rd edn., Charlottesville, LexisNexis, 2004), p. 30.

65 *See e.g.,* the reports of the Parliamentary Monitoring Group, <www.pmg.org.za/>, 6 January 2006.

66 M. Bersten, above n. 13, p. 21.

67 Ibid.

68 Ibid., p. 22. This is discussed further in Chapter 8. It is vital that taxpayers have complete confidence that their confidential tax information cannot be revealed to parliament or to any other third party.

69 Ibid.

70 Ibid.

– it can influence the revenue authority through the many other government departments that interact operationally with the revenue authority; and
– it has the ultimate power of appointment of the head and sometimes other senior members of the revenue authority.

The revenue authority's major strength is its independence. Given the dependence of most governments on tax revenues, the revenue authority is in a powerful position of influence simply because it collects the budgeted revenue and implements both revenue legislation passed by parliament and subordinate revenue legislation introduced by the executive.[71] Its input into revenue policy and the design of new laws can be critical in making them effective. Where the system works well, there should be a balance between the government and the revenue authority that ensures both independence and accountability.

In some jurisdictions, the demand for accountability requires more than the higher level oversight provided by a responsible minister or an oversight committee of parliament. It focuses on more detailed governance issues including the strategic function and operation of the tax system. Appointing independent members of a body specifically responsible for oversight of the tax system is most common. For example, in response to this requirement, Canada constituted a Board of Management with 15 members, 11 nominated by the provinces and territories. External appointees bring a broad range of backgrounds and expertise to the strategic and organisational management of the CRA. A similar external expertise is brought to the Board of HMRC in the United Kingdom by the non-executive directors. In 1998, following continuing public concerns about the operation of its IRS, the United States introduced an IRS Oversight Board as part of the popularly known Taxpayer Bill of Rights 3.[72] This approach has been followed in those jurisdictions seeking to cope with major reform of their systems in response to fiscal crises. For example, Pakistan's 2001 reform strategy included increased autonomy for the Central Board of Revenue subject to oversight by a Supervisory Council comprising a range of government officials and the possibility of co-opted private sector representatives.[73]

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71 Ibid.

72 A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles?' in D. Bentley, above n. 7, p. 347. An Act to amend the Internal Revenue Code of 1986 to restructure and reform the Internal Revenue Service and for other purposes PL 105-206. *See generally*, OECD, above n.20, pp. 12-14.

73 Central Board of Revenue, above n. 26.

Where the government does not want to appoint independent members to a governing body there are other options. In response to criticism of the tax system, in 2000 the Australian Government introduced the Board of Taxation, with no reporting relationship to the Commissioner of Taxation, but whose advisory function to the Treasurer included:[74]

- the quality and effectiveness of tax legislation and the processes for its development, including the processes of community consultation and other aspects of tax design;
- improvements to the general integrity and functioning of the taxation system;
- research and other studies commissioned by the Board on topics approved or referred by the Treasurer; and
- other taxation matters referred to the Board by the Treasurer.

The Board of Taxation recommended the establishment of the office of Inspector-General of Taxation as a further independent observer of the tax system, to advise the government on tax matters and, in particular, to identify systemic problems in tax administration.[75] The Minister for Revenue agreed to the establishment of the office as an independent taxpayer advocate and adviser to the Government, stating that her key priorities were to improve the responsiveness of the tax system to the genuine concerns of taxpayers and to ensure that the tax system is fair.[76] The position was established in 2003 as an independent position appointed by the Governor-General with an annual reporting requirement to Parliament to ensure transparency.[77]

Some argue that oversight boards or similar bodies can themselves be designed to constrain the operations of the revenue authority in favour of taxpayers. Greenbaum argued that the IRS Oversight Board was 'a legislative invitation to second guess and thus restrict the Commissioner in the performance of her or his job of running the IRS'.[78] If this were the case, the Board would not be applying appropriate governance principles. Oversight must go

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74 The Charter of the Board of Taxation, <www.taxboard.gov.au/content/charter.asp>, 6 November 2006.

75 Board of Taxation, *Inspector-General of Taxation: A Report to the Minister for Revenue and Assistant Treasurer* (2002), <www.taxboard.gov.au/content/>, 6 November 2006.

76 Press Release by the then Minister for Revenue and the Assistant Treasurer, Senator the Hon. H. Coonan, 16 September 2002, <assistant.treasurer.gov.au/atr/content/pressreleases/2002/098.asp>, 6 November 2006.

77 The Press Release, ibid., outlines the rationale for the appointment and its scope.

78 A. Greenbaum, above n. 72, p. 367.

hand in hand with appropriate use of oversight powers and responsibilities and any external oversight body should not be open to capture by special interest groups intent on pursuing a particular agenda. As Highfield and Baer noted in the context of Russian tax administration in 2000:[79]

> A balance should exist between the rights of the taxpayer, whose rights are ensured by due process and fair treatment, and the tax administration, which should have powers sufficient to administer and enforce the tax law in an efficient and even-handed manner.

It is not sufficient simply to establish external oversight of the revenue authority. It is essential that the oversight is exercised in accordance with principles of good governance. Creating a balance between independence and accountability is difficult, but is the key to an effective revenue authority. Majone urges a note of caution in designing an autonomous yet accountable system. He argues that regulators and agencies are often criticised for shortcomings in this regard, 'which in many cases are due less to their actions or omissions than to the way the enabling statutes have been written'.[80] The effectiveness of the oversight of the revenue authority is therefore predicated on its design. This in turn is highly dependent on the jurisdictional context and existing government structures and accountabilities. Oversight of the revenue authority cannot be held hostage to a system where the existing structures would make it meaningless. But it is equally pointless introducing independence and accountability measures that bear no relationship to the system in which they are supposed to operate.[81]

C. Principles of good governance

Good governance is essential to the effective administration of a tax system. The oversight body, whatever form it takes, should apply good governance

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[79] R. Highfield and K. Baer, 'Tax Administration for Russia', paper presented at Fiscal Affairs Department, IMF Conference on Post-Election Strategy, (Moscow, 5-7 April 2000) p. 2.

[80] G. Majone, 'Agency Independence and Accountability', in OECD Working Party on Regulatory Management and Reform, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Proceedings of an Expert Meeting (London, UK, 10-11 January 2005) pp. 52-53, <www.oecd.org/dataoecd/15/28/35028836.pdf>, 6 November 2006.

[81] For a more extensive discussion on structures for accountability, *see* G. Majone, 'Strategy and Structure: the Political Economy of Agency, Independence and Accountability' in OECD Working Party on Regulatory Management and Reform, ibid., p. 126.

principles if that is their role, or comment on how well good governance principles are being applied if their function does not involve governance. The revenue authority's senior management and board, if there is one, should also be acutely conscious of and seek to implement good governance principles.

In their discussion of existing taxpayer protection, Baker and Groenhagen note the paucity of measures taken to set international governance standards for taxation.[82] This can be explained in the context of the extensive worldwide focus on the development of governance principles generally, and the numerous guidelines applicable to government institutions specifically. The broader focus on governance has impacted on tax administration through a variety of associated documents that are applicable to revenue authorities. There is considerable overlap between governance and service standards. The former are concerned with the governance of the tax administration and its organisation. The latter focus on the standards of service provided by the administration to taxpayers, but in a number of areas, such as compliance, as discussed in Chapter 2, this impacts directly on risk management and therefore governance. However, it is important to distinguish between the two and this section deals with principles of governance and the next section deals with public service standards as principles of good practice.

Although 'there is a high correlation between governance quality and per capita income',[83] attempts to improve governance in the public service is not restricted to OECD countries. For example, countries such as India, through the Department of Administrative Reforms and Public Grievances[84] and Malaysia, through an extensive public service quality programme,[85] have developed highly sophisticated governance principles and public service standards for application in non-OECD environments. One of the most useful benchmarks was that issued by the Independent Commission for Good

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82 P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001), ch. 2.

83 J. Huther and A. Shah, *Applying a Simple Measure of Good Governance to the Debate of Fiscal Decentralization* (1998 World Bank Policy Research Working Paper 1894), <www.worldbank.org/wbi/governance/wp-governance.html>, 6 November 2006.

84 *See* the comprehensive website of Citizens' Charters in Government of India <www.goicharters.nic.in>, 6 November 2006.

85 *See, e.g.*, Malaysian Administrative Modernisation and Management Planning Unit (MAMPU), *The Civil Service of Malaysia - Moving into the New Millennium* (2000 MAMPU), <www.mampu.gov.my/mampu/bm/Publications/Book/NMillennium/Main.htm>, 6 November 2006.

Governance in Public Services in the UK, *The Good Governance Standard for Public Services* (Good Governance Standard).[86] It sets out six major principles:[87]

1. Good governance means focusing on the organizations' purpose and on outcomes for citizens and service users.
2. Good governance means performing effectively in clearly defined functions and roles.
3. Good governance means promoting values for the whole organisation and demonstrating the values of good governance through behaviour.
4. Good governance means taking informed, transparent decisions and managing risk.
5. Good governance means developing the capacity and capability of the governing body to be effective.
6. Good governance means engaging stakeholders and making accountability real.

The detailed content of each principle is reinforced by sub-principles and explanations.[88] They are all applicable to some extent to the governance of a revenue authority. Where there is no specific governing body, the fifth principle would apply to those that act in that capacity for the revenue authority as the external oversight body. It is important for parliamentary committees or other such bodies responsible for external oversight to realize the responsibility they have in assessing and challenging the standards of governance exercised by the revenue authority. The Good Governance Standard includes as an Appendix sample questions to aid in this task.[89]

In assessing the need for revenue authority oversight it was noted that Thuronyi raised six areas where tax administration could be seriously undermined. By properly applying the Good Governance Standard to a revenue authority exhibiting those characteristics it is likely that most, if not all, would be addressed. A combination of strong ethical organisational values, effective risk management, good quality information, an emphasis on accountability and the provision of an environment in which high quality 'staff can

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86 (2004 OPM and CIPFA), <www.opm.co.uk/ICGGPS/download_upload/Standard.pdf>, 6 November 2006.

87 Ibid., p. 5.

88 Ibid., pp. 5-26.

89 Ibid., Appendix B, p. 31.

perform well and deliver effective services'[90] would act to reduce corruption significantly. Lack of knowledge and competence of tax officials would be overcome by the principle that good governance means engaging the staff as stakeholders and making accountability to them as employees real. The principle gives a responsibility to ensure that staff recruitment, training and motivation are maintained at a high level to meet the objectives of the revenue authority. The same principle would require the oversight body to fight against low investment in staff with the provision of poor wages and conditions. The combination of achieving the revenue authority's objectives, the engagement of taxpayers as stakeholders and accountability to taxpayers, would overcome procedural failures identified by Thuronyi. What could not be overcome simply by good governance is where tax officials are subject to physical danger because of their role. However, the engagement of taxpayers as stakeholders and striving to achieve a perception that the tax system is fair, should go some way to reducing taxpayer aggression towards the system.[91]

Where public service standards have become ingrained into the culture of the revenue authority, it is more likely that taxpayers' rights will be upheld. This will usually only be possible where the governance principles support the integrity and effective operation of the tax system. In that sense, as in the areas of substantive law, the introduction of the Model is but one aspect of the legal and administrative environment that is necessary to support a genuine recognition and application of taxpayers' rights. As identified above, the more entrenched the rule of law, the more likely that there is an environment in which governance principles can be observed.[92] Whether they will be observed depends in addition on the accountability and transparency of government.[93] However, as noted in Chapter 2, improved governance and increased engagement do not necessarily flow from socio-economic development. Kaufmann argues that:[94]

> the process of economic development does not in itself automatically ensure improved governance, civil liberties and control of corruption. The causality direction is from improved governance (including civil and political liberties) to economic development, and not vice versa.

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90 Ibid., p. 24.

91 Implicit in the analysis by L. Rakner and S. Gloppen, above n. 36, pp. 12-17.

92 *See* D. Kaufmann et al., above n. 31 and F.D.A.M. Luoga, above n. 24, p. 8.

93 *See generally*, OECD Working Party on Regulatory Management and Reform, above n. 80.

94 D. Kaufmann, 'Human Rights and Governance: The Empirical Challenge' in P. Alston and M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford, OUP, 2005), p. 352, s. 5.

His research shows that it requires specific intervention by the state and the formulation and implementation of policies on governance to establish the climate both for human rights to be observed and economic development to occur.[95]

Moving from the general governance principles of *The Good Governance Standard for Public Services*, a specifically relevant and internationally acceptable[96] set of principles, many of which are directly applicable to the governance of a revenue authority, is the 2001 IMF *Code of Good Practices on Fiscal Transparency*[97] (IMF Code). The IMF Code is largely concerned with higher level issues, but elements relate directly to the Model.

1. The IMF code

The IMF Code is in four sections. Section 1 focuses on the 'Clarity of Roles and Responsibilities'. It applies to government generally. Applying it specifically to the administration of the tax system, it supports a number of the arguments already made in this Chapter:[98]

> 1.1 The government sector should be distinguished from the rest of the public sector and from the rest of the economy, and policy and management roles within the public sector should be clear and publicly disclosed.
>
> 1.1.1 The structure and functions of government should be clearly specified.
>
> 1.1.2 The responsibilities of different levels of government, and of the executive branch, the legislative branch, and the judiciary, should be well defined.
>
> 1.1.3 Clear mechanisms for the coordination and management of budgetary and extrabudgetary activities should be established.

There are further points requiring a clear delineation of the roles of government, nongovernmental public sector agencies and the private sector. The first points set out above support the clear separation of responsibilities between the three arms of government. As discussed earlier, this requires that

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95 Ibid., *see* the conclusions in s. 5, summarizing the earlier analysis, particularly in ss 2 and 3.

96 This does not mean that they are likely to be observed in most countries.

97 IMF Code, above n. 12.

98 Ibid., p. vii.

the role of the revenue authority as an arm of the executive be clearly specified. It impacts directly on a number of the rights considered below (and a number of those set out in Chapter 6), which are designed to prevent the revenue authority from usurping the role of either the legislature or the judiciary.

The requirement that the policy and management roles within the public sector be clear and publicly disclosed protects the revenue authority from interference by other government departments. In regimes where corruption is rife, we have seen that it was a significant reason for the introduction of semi-autonomous revenue authorities. From that discussion, it was also clear that part of the failure of semi-autonomous revenue authorities to make a longer-lasting impact in countries such as Uganda, Zambia and Tanzania was because there were no clear mechanisms for the coordination and management of budgetary activities.[99] It ties in with the next sub-section of the IMF Code:[100]

> 1.2 There should be a clear legal and administrative framework for fiscal management.
>
> 1.2.1 Any commitment or expenditure of public funds should be governed by comprehensive budget laws and openly available administrative rules.
>
> 1.2.2 Taxes, duties, fees, and charges should have an explicit legal basis. Tax laws and regulations should be easily accessible and understandable, and clear criteria should guide any administrative discretion in their application.
>
> 1.2.3 Ethical standards of behaviour for public servants should be clear and well publicized.

A clear legal and administrative framework for the tax system is fundamental both to principles of good governance and taxpayers' rights. In particular, the necessity for an explicit legal basis for all taxes was discussed in Chapter 6 and is set out in Article 4 of the Model. Article 4 also incorporates the requirement that any administrative discretion should be governed by clear criteria. The requirement that tax laws and regulations should be easily accessible and understandable ties back to the principles of certainty and simplicity discussed in Chapter 3. It is important to note that the explanations of 1.2.2 in the IMF Code also extend to cover 'Taxpayer Rights and Openness of Administrative Decisions to Independent Review'.[101] The list of rights mentioned provides

99 L. Rakner and S. Gloppen, above n. 36, p. 11.

100 IMF Code, above n. 12, p. vii.

101 Ibid., p. 20.

further support for the Model and the reference in the IMF Code is noted elsewhere in this book in the context of the discussion of individual rights.

One of the most significant principles included in the IMF Code is the requirement for clear and well publicized ethical standards for public servants.[102] This should include all employees of the revenue authority, even where the revenue authority is autonomous and its employees are not public servants. Ethics cannot be legislated. However, the substantive tax law includes a range of penalties for breach of major ethical requirements, such as the requirement of revenue officers to maintain the confidentiality of taxpayers' records and information. Nonetheless, it is a principle of good governance to maintain an environment in which revenue authority employees are acutely aware of the ethical responsibilities that they bear. These should also be articulated for the benefit of taxpayers in any document setting out their administrative rights and obligations. This is discussed further in the next section and as a general principle of administration in Chapter 8.

There is limited direct applicability of the remainder of the IMF Code to the revenue authority in the context of taxpayers' rights. However, the basic principles surrounding the effective fiscal operation of a government are directly applicable to the revenue authority as it contributes towards and participates in that operation. They are basic governance principles and taxpayers have the right to expect that they will be implemented in order to protect the fabric, structure and operation of the tax system.

Those principles that are particularly relevant to taxpayers' rights are:[103]

> 2.1 The public should be provided with full information on the past, current, and projected fiscal activity of government.
>
> 2.2 A commitment should be made to the timely publication of fiscal information.
>
> 3.3 Procedures for the execution and monitoring of approved expenditure and for collecting revenue should be clearly specified.
>
> 3.3.4 The national tax administration should be legally protected from political direction and should report regularly to the public on its activities.

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[102] The IMF Code identifies the *United Nations' International Code of Conduct for Public Officials*, <www.un.org/ga/documents/gares51/gar51-59.htm>, 6 November 2006, as the basis for ethical standards and the OECD-PUMA principles for managing ethics in the public sector as best practice, *see* <www.oecd.org/puma/gvrnance/ethics/>, 10 January 2006.

[103] Ibid., pp. viii-x.

> 4.1 Fiscal data should meet accepted data quality standards.
>
> 4.1.3 Specific assurances should be provided as to the quality of fiscal data. In particular, it should be indicated whether data in fiscal reports are internally consistent and have been reconciled with relevant data from other sources.
>
> 4.2 Fiscal information should be subjected to independent scrutiny.
>
> 4.2.1 A national audit body or equivalent organization, which is independent of the executive, should provide timely reports for the legislature and public on the financial integrity of government accounts.
>
> 4.2.3 A national statistics agency should be provided with the institutional independence to verify the quality of fiscal data.

There is a focus on the full provision of information to the public and the monitoring of the quality and integrity of that information. It extends the principle of transparency, articulated in Chapter 2 in the context of the design and implementation of tax rules, to the fiscal activity of the government. Although not directly within the management control of the revenue authority, the principles cover the broader fiscal activity in which the revenue authority plays such a critical part.[104] If Kaufmann is correct, improved governance will lead to economic development.[105]

The principles apply to the autonomy of the revenue authority discussed above. However, as was pointed out, autonomy must exist in fact and not just on paper. Bird notes that without the political will not to interfere there is little to stop such interference occurring in many developing countries.[106] Articulation of governance principles does at least increase awareness that they exist. This is reinforced where there is a national audit authority that is independent of the executive and that provides regular, comprehensive and accurate reports on the fiscal health of the country. As these reports are made to parliament and

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104 Except in those instances identified by Moore, particularly the anti-democratic effect of dependence on aid and other sources of government income such as sectoral and illegal levies, all of which significantly reduce the importance of central revenue raising and budgeting. Described in M. Moore, 'Death Without Taxes: Democracy, State Capacity and Aid Dependence in the Forth World' in M. Robinson and G. White (eds.), *The Democratic Developmental State: Political and Institutional Design* (Oxford, OUP, 1998), p. 84. *See further* M. Moore, 'Political Underdevelopment: What Causes "Bad Governance"?' (2001) 3 *Public Management Review*, 3.

105 D. Kaufmann, above n. 94.

106 R.M. Bird, above n. 38.

are accessible by the public generally, they begin to entrench the concept of accountability. Widening the tax net in countries where it has been sectoral and where the base is narrow involves more taxpayers in the tax system and there is an increasing propensity to give voice to concerns they might have.[107]

However, if the audit, monitoring and reporting activities are to be effective the quality and integrity of data must be assured. This is always going to be difficult in developing countries, but it is an area of particular focus, for obvious reasons, by donor countries. The IMF Code notes, for example, that the IMF is systematically developing a data quality assessment framework that 'is designed to be a flexible, comprehensive tool that can be used in a variety of country situations by experts and non-experts alike'.[108] External accountability is reinforced by the requirement to provide accurate figures for anything from trade negotiations to ensuring as high a sovereign credit rating as possible. Accuracy in one area of government can then flow through to other areas.

Although the IMF Code gives little explanation of the procedures that should be 'clearly specified' for collecting revenue in 3.3, this is a very important point. It identifies the procedural implementation of the tax laws and regulations imposing tax. The procedures will be both formal and informal. Many are included in the substantive tax law. Others are administrative and included in internal manuals and handbooks. In the explanation of 1.2.2, with the requirement that clear criteria should guide any administrative discretion, the IMF Code does state that 'the material the tax agency uses in applying the tax laws (e.g., manuals and legal opinions) should be publicly available'.[109] Applying this as a principle of governance fits neatly with the underlying principles of certainty and simplicity identified in Chapter 3. It also overcomes the concerns in tax systems where there is little transparency.

For example, Ishimura writes of Japan, that 'tax procedures are extremely opaque so that many decisions are made arbitrarily by the tax authorities'.[110] Arbutina, writing from a Croatian perspective, makes the point that for countries in transition major tax reform 'is enough to cause an administrative nightmare',[111] which makes transparency difficult during the transitional

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107 D. Kaufmann, above n. 94 and L. Rakner and S. Gloppen, above n. 36 pp. 12-16.

108 IMF Code, above n. 12, p. 65.

109 Ibid., p. 19.

110 K. Ishimura, above n. 18, p. 227, p. 230. *See also*, T. Okamura, 'The Japanese Tax System: Due Process and the Taxpayer' (1993) 11 *International Tax and Business Law*, 125.

111 H. Arbutina, 'Taxation in Croatia: Developments in the Field of Taxpayers' Rights and Obligations' in D. Bentley, above n. 7, p. 138, p. 145.

period. However, he also reinforces the point made by Rakner and Gloppen,[112] that tax reform increases democratic accountability simply by virtue of raising taxpayer concerns that they are facing or likely to face increased taxation.[113]

To comply with the IMF Code, the Model must reflect the requirement for clear specification of procedures for collecting revenue. It does so by requiring a legal basis for taxation and administrative discretion, together with criteria for the exercise of that discretion. It also requires that taxpayers should have access to information affecting any aspect of the procedures governing tax administration, collection and enforcement. The Model must emphasise the importance of governance principles generally and at this stage it is appropriate to require that the revenue authority should ensure compliance in all areas of its responsibility with the IMF Code. A future development may be to include a model set of governance principles as an appendix to the Model.

D. Principles of good practice

Historically, public service standards have been the instruments used to govern public service administration. The Australian Public Service standards, for example, were introduced in 1922 and updated in 1999.[114] The OECD noted the extent of public service or Citizen's Charters in its 1996 review.[115] The general detail of public service standards governing administration of government departments, including the revenue authority, forms the background to parts of the Model. Public service standards are relevant to the governance, management and operation of the revenue authority. However, the detailed content is generally applicable to any government department (and often also to any public service body whether public or private). This Section therefore focuses on identifying those standards that are directly relevant to the Model.

In doing so, it analyses both general and specific principles of good practice relevant to tax administration. As discussed in Chapters 4 and 5, principles of good practice generally comprise administrative rights and goals that are prima facie unenforceable. These are not exactly congruent

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112 L. Rakner and S. Gloppen, above n. 36, pp. 12-16.

113 H. Arbutina, above n. 111, p. 150.

114 Public Service Regulations 1922 (Cth), updated by the Public Service Act 1999 (Cth).

115 OECD, *Responsive Government: Service Quality Initiatives* (OECD, 1996), <www.oecd.org/findDocument/0,2350,en_2649_34275_1_119699_1_1_37405,00.html>, 10 January 2006.

with the inclusions in most revenue authority documents setting out taxpayers' rights as these often include enforceable rights and also describe, in broad terms, taxpayers' obligations. However, as the documents issued by revenue authorities are the product of extensive research and are widely accepted, they should form the starting point for the principles of good practice. Secondary legal and primary administrative rights that are contained in revenue authority documents are discussed in Chapter 8.

The principles of good practice provide the practical administrative framework to support the Model's implementation. As such, the potential and justifiable variation in any compilation of principles of good practice makes it impossible to provide a model set of principles. What is more useful is to provide an illustration of recognized examples of high quality principles of good practice.

It is also very important to separate the unenforceable administrative rights and goals from the enforceable rights in the Model. The separation underlines the fact that any right included in the Model must be substantially enforceable. If the two were combined in the Model, there would be a strong temptation to issue a generic document from the revenue authority including both enforceable and unenforceable rights, but without providing for the enforcement of the enforceable rights. The rationale would be that if a right is included in a document issued by the revenue authority the right has therefore been given to taxpayers and no further action is necessary. The reality is that rights requiring legislation or the exercise of specific administrative discretion do not exist until the relevant legislation is passed or administrative discretion is exercised. It is easy to fudge the implementation of taxpayers' rights and the Model must avoid facilitating fudging of this kind.

Before examining the documents issued by individual revenue authorities, it is useful to take a step back and examine the work done in this area by the OECD. The OECD Centre for Tax Policy and Administration has produced two relevant documents: *Principles of Good Tax Administration — Practice Note* (GAP001) and *Taxpayer Rights and Obligations* (GAP002).[116]

1. OECD GAP001

GAP001 is concerned with the principles of good tax administration. Much of its focus is on promoting high standards of international cooperation among tax administrations. There is much less detail on the principles

[116] Available at <www.oecd.org>, 10 January 2006.

applicable to domestic tax administration. GAP001 is consistent with the principles set out in Chapter 3, including aspects of the neutrality principle. As an OECD document, it puts forward OECD policy. Much of it is uncontroversial and represents accepted best practice. Some points may draw criticism from a wider audience. For example, revenue authorities are encouraged to support the arm's length principle and the OECD guidelines on transfer pricing. They are also encouraged to manage issues relating to tax competition and tax havens by identifying risks and elaborating administrative strategies. However, GAP001 encapsulates most of the principles that should underpin a tax administration intent on protecting taxpayers' rights. Indeed, GAP001 is designed to provide the basis for GAP002, which sets out taxpayers' rights and obligations.

GAP001 begins with an introductory section on the goals and challenges of revenue authorities.[117] Consistent with the principles of good governance discussed above, it highlights the importance of a revenue authority understanding its purpose and goals, ensuring that its use of resources is the most effective and efficient to achieve them.[118] It is assisted in doing so if it uses a combination of technology, benchmarking and testing to improve its public image and the organisation of its work processes.[119] The language of 'management' as a discipline has permeated revenue authorities relatively recently. Traditionally the concept of a strategic plan and a business model for a revenue authority was not well known. This has changed dramatically and the best run revenue authorities are models of good management practice. At the 2004 6th International Conference on Tax Administration in Sydney, it was instructive that the keynote addresses by the Australian Commissioner of Taxation and the New Zealand Commissioner of Inland Revenue both began by setting out the strategic goals of their respective organisations.[120] The Australian Commissioner of Taxation went on to describe the ATO Business Model.[121]

Arguably, it should be taken for granted that the management of a revenue authority will follow accepted best practice. That is implicit in the Good

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117 GAP001, 3.

118 Ibid., para. 2.

119 Ibid.

120 M. Carmody, Commissioner of Taxation, 'The Art of Tax Administration: Two years on' and D. Butler, Commissioner of Inland Revenue, 'Challenges of Globalising Tax Systems — New Zealand's Journey', papers presented at the 6th International Conference on Tax Administration, Atax (Sydney, 15-16 April 2004).

121 Ibid., p. 3.

Governance Standard discussed in the previous section. However, as is apparent from research into developing countries, the tax administration is often starved of the capacity and resources to achieve this. Barbone et al. note that during the 1990s, 37.2 per cent of World Bank projects had as one of their objectives the strengthening of administrative institutions and 16.3 per cent of projects the strengthening of administrative capacity.[122] Until a revenue authority achieves at least a minimal level of good management practice, supported by the resources necessary to give effect to its strategic plan, it is unlikely to be able to observe the basic Model. Arguably, a revenue authority in this position is not a fully operational revenue authority and the Model should not be diluted to cater for this kind of tax administration. Rather, whether the basic Model can be properly implemented is a benchmark for revenue authorities to show that they have reached a minimum operational standard to run their tax administration.

A clause requiring adequate funding for the revenue authority as a budget priority is therefore appropriate within the Model. It may be ignored or paid lip-service. But to have such a clause in the legislation setting up a revenue authority ensures that it is at least recognized as important to effective tax administration.

GAP001 identifies the primary goals of a revenue authority as promoting voluntary compliance, developing strategies to deal with non-compliance and addressing the opportunities and challenges of globalisation.[123] This is achieved by carefully managing and promoting good relationships with the key stakeholders in the tax system: taxpayers, employees of the revenue authority and other revenue authorities.[124] The management of these relationships takes place in a context of 'clear, simple and "user-friendly" administrative systems and procedures',[125] an ability to adapt to change in the business and legislative environment, and careful domestic and global risk management.[126]

Many of the principles set out in GAP001 are dealt with elsewhere in the Model and often constitute legislative or administrative rules within a tax system. Most revenue authorities will incorporate the remaining principles of

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122 L. Barbone, A. Das-Gupta, L. De Wulf and A. Hansson, 'Reforming Tax Systems: The World Bank Record in the 1990s', World Bank Policy Research Working Paper 2237, (November 1999), <www.worldbank.org/wbi/governance/wp-governance.html>, 6 November 2006.

123 GAP001, above n. 117, pp. 3-4.

124 Ibid.

125 Ibid., para. 4.

126 Ibid., pp. 3-4.

good tax administration outlined in GAP001 into other parts of their strategic planning documentation and management principles and processes.[127] Without addressing these principles, even if it is at a lower level in some instances than GAP001, or uses a different approach, it is unlikely that a revenue authority can operate effectively in an increasingly interactive global tax environment.

2. OECD GAP002 and taxpayer's charters

The rationale for encapsulating administrative rights and broader taxpayers' rights in an administrative charter was set out in Chapter 4. Article 6 of the Model states that, 'All rules applicable in the tax system shall be compiled and published accurately and in a form that is accessible to all users'. Paragraph 21 of GAP002 reinforces the importance of accessibility, emphasising the importance of summarising and explaining a taxpayer's rights and obligations in plain language so as to make 'such information much more widely accessible and understandable'.

A charter generally contains rights and obligations. Most are derived from administrative and legislative rules dispersed across the tax system. The advantage of a charter is to draw together those that are most important for taxpayers to know when dealing with their tax affairs. It often also allows the revenue authority to articulate a sense of its culture and values to taxpayers. As emphasised in Chapter 2, taxpayers' rights and equally, taxpayers' charters, must be shaped to fit the individual context of each jurisdiction. The point made in Para. 23 of GAP002 is critical: 'In drawing up a taxpayers' charter a jurisdiction must properly reflect their own policy and legislative environment and their own administrative practices and culture'. A jurisdiction without a charter does not necessarily respect taxpayers' rights any less than one with a charter. This is self evident if one examines the charters on the websites of revenue authorities in jurisdictions where there are documented case studies of corruption or revenue mismanagement.

Even in jurisdictions where taxpayers' rights are widely accepted, a charter is not essential. The point made in GAP002 at Para. 23, is that it is the underlying practice that is important. The publication of those practices

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[127] It is supported in much of the discussion in the United Nations Economic and Social Council Committee of Experts on International Cooperation in Tax Matters. *See* <www.un.org/esa/commissions.html>, 11 October 2006.

in accordance with Article 6 of the Model can take place in different ways. In two articles on the subject, James, Murphy and Reinhart argue that the UK Taxpayer's Charter was something of a failure as an initiative and has been left to atrophy.[128] The articles argue that to be successful the process of formulating a Charter should follow the Australian model. A key difference was that the Australian Taxpayers' Charter was formulated following systematic preparation, a review of previous experience and widespread consultation.[129] The ATO then adopted the Charter values as its own so that they became inculcated across the organisation, feeding into its Compliance Model and later reflected in an 'Integrity Framework', which sets out the ATO's underlying behaviours, values and ethics.[130] Subsequent reviews of the Australian Taxpayers' Charter have shown that the ATO has largely succeeded in this approach.[131]

This analysis suggests, therefore, those jurisdictions that wish to introduce successful Taxpayers' Charters or similar documents should ensure that they incorporate into the implementation process at least two important steps. The first is to ensure that there is wide stakeholder input into the formulation of the Charter and how it is to be implemented. The Australian experience showed that stakeholders did not need to agree with the process for it to succeed.[132] The second is to ensure that the culture of the revenue authority is changed over time so that the Charter reflects the way the revenue authority operates. The longitudinal surveys of taxpayers' views of the Taxpayers' Charter in Australia clearly show that Charters can become living documents.

Taxpayers' Charters can be effective but need not exist for taxpayers' rights to be protected. They do represent a useful means of complying with the need to publish the taxpayers' rights and obligations contained in the tax rules

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128 S. James, K. Murphy and M. Reinhart, 'The Citizen's Charter: How such Initiatives might be More Effective' (2005) 20 *Public Policy and Administration*, 1, p. 15 and S. James, K. Murphy and M. Reinhart, 'The Taxpayer's Charter: A Case Study in Tax Administration' (2004) 7 *Journal of Australian Taxation*, 336, 342.

129 S. James, et al., ibid., 'The Citizen's Charter: How Such Initiatives Might Be More Effective' (2005), 1, p. 10. The process is described in M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22.

130 M. D'Ascenzo, 'Living our values', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006), p. 7.

131 S. James et al., above n. 128; 'The Taxpayer's Charter: A Case Study in Tax Administration' (2004) 7 *Journal of Australian Taxation*, 336; and TNS Consultants, *Review of the Taxpayers' Charter 2005* (Canberra, TNS Social Research, 2006), <www.ato.gov.au>, 1 August 2006.

132 S. James et al., above n. 129, p. 9.

of a jurisdiction. They also provide an opportunity to publish those principles of good practice that are unenforceable legislative or administrative rules. GAP002 represents a comprehensive if not exhaustive example of a taxpayers' charter of rights and obligations. Rather than designing a competitive example, it makes sense for the Model to include GAP002 in an appendix.

3. Identifying principles of good practice

Principles of good practice comprise those principles that are not legal or administrative rights. As noted in Chapter 5, it is their direct or indirect enforceability that provides them with substance that goes beyond aspiration.

A principle that states that revenue officers will deal courteously with taxpayers has no legal definition or content unless the revenue officer behaves so badly that her or his action becomes delictual, tortious or criminal. It has no real content at all if when a taxpayer complains that he or she has been treated discourteously; there is no means of redress and there are no consequences. However, the principle has real content if when the taxpayer complains, the complaint is taken seriously, it is investigated, and can lead to disciplinary action against the offending revenue officer. It has even more substance if the performance of the manager of the relevant unit is also affected by the outcome of the complaint investigation. This would occur if he or she is judged against a key performance indicator that measures the incidence of complaints of this kind and adverse or favourable consequences can result. For example, an annual bonus might depend on meeting targets across a range of such key performance indicators.

The use of performance indicators to assess tax administration and individual revenue officers is becoming more common. James, Svetalekth and Wright provide a useful survey of the literature and note the broad correlation between the success of taxpayers' charters and the use of performance indicators.[133] Part of the success relates to the development of a response by

[133] S. James, T. Svetalekth and B. Wright, 'The Benefits of a More Strategic Approach to Tax Administration and the Role of Performance Indicators' paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2000). *See*, *e.g.*, M. Klun, 'Performance Measurement for Tax Administrations: The Case of Slovenia' (2004) 70(3) *International Review of Administrative Sciences*, 567; P. Seera, 'Performance Measurement in Tax Administration: Chile as a Case Study' (2005) 25 *Public Administration and Development*, 115; and C. Habammer, 'Performance Comparison of Tax Offices in Germany: A Project in the States of Bavaria, Rhineland-Palatinate, Saxony and Thuringia', paper presented at the CIAT Technical Conference (Paris, 2002).

the revenue authority to taxpayer concerns over real or perceived breaches of the charter.[134]

However, not all actions of the revenue authority can be measured directly. Where there is direct measurement, albeit only through a performance indicator, there is administrative enforcement and the right is a secondary administrative right. For example, a service standard might commit the revenue authority to respond to all emails within 3 days and to provide an answer to all email requests within 14 days unless the matter is complicated and the taxpayer has been notified of the delay and given an alternative timeframe for a response. If this standard is not met, a taxpayer may then be able to follow the complaints procedure through a number of steps, all the way to the ombudsman. Most taxpayers would not take complaints of this nature through to the ombudsman. However, the possibility makes it a secondary administrative right. Most taxpayers would be satisfied with acknowledgement of the error and an apology. This latter step is a principle of good practice.

The difference is often blurred. Performance indicators can measure at a less specific level. For example, measurement of the incidence of complaints is common. However, that does not provide a specific enough measure to ensure that a revenue officer apologizes when it is warranted. It becomes ridiculous and counter-productive to take the measures down to the level of recording when an apology was required and recording to ensure that it was given. This is where staff training and the importance of the values that imbue the operation of the revenue authority come into play.[135] Principles of good practice moderate the behaviour of revenue officers as they interact with each other and with taxpayers. They govern how revenue officers go about their daily work.

The range of principles of good practice is as broad as the different behaviours that might be used to implement any of the facets of tax administration. The principles enumerated here do not include most of those that are incorporated into revenue authority values statements. Rather they include those that focus specifically on the interaction between the revenue officer and the taxpayer.

This section sets out those more commonly found in GAP002 supplemented by those taken from taxpayers' charters from around the world.[136] It does not include any rights that are dealt with in Chapter 8 as legal or administrative

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134 TNS Consultants, above n. 131.

135 *See* M. D'Ascenzo, above n. 130.

136 The Charters of New Zealand <www.ird.govt.nz>, 1 October 2006; Canada <www.cra-arc.gc.ca>, 1 October 2006; South Africa <www.sars.gov.za>, 1 October 2006; and Australia <www.ato.gov.au>, 1 October 2006, are particularly helpful and provide the basis for most of the principles listed.

rights although many of the principles are derived from or form part of those rights. In some jurisdictions some of the Chapter 8 rights will not have legal or administrative enforcement. For the purposes of the Model, they should have such enforcement and are therefore considered in that context. The principles of good practice are self-explanatory and do not include additional commentary.

Revenue authorities should:

1. Act professionally in all dealings with taxpayers.
2. Treat taxpayers with courtesy, consideration and sensitivity.
3. Listen to taxpayers' concerns.
4. Consult with key stakeholders or their representatives before significant changes are introduced.
5. Take account of a taxpayer's particular circumstances, especially individual, cultural and special needs, to the extent allowed by law.
6. Treat taxpayers as being honest in their tax affairs unless they act otherwise.
7. Minimize the costs of complying with tax obligations.
8. Provide assistance to taxpayers to help them understand and meet their tax obligations.
9. Make sure publications and other communications are clear, accurate, helpful and easy to understand.
10. Keep looking for new and better ways to give taxpayers advice and information.
11. Conduct general education programmes for both existing and potential taxpayers.
12. Provide taxpayers with easy access to and identification of contact details.
13. Be accessible and attend to enquirers, whether by telephone, mail or in person, within specified times designed to minimize delay.
14. Deal with urgent requests without delay, whether by telephone, mail or in person.
15. Answer telephone calls promptly and without unnecessary transfer.
16. Make an effort to ensure the taxpayer is put in touch with the appropriate person the first time.
17. Try to get all aspects of interaction with taxpayers right first time by making best use of all of the information available.
18. Follow through on what they say they will do.
19. Ensure that their staff are well trained, competent and up-to-date with changes in the law that affect their roles.

20. Strive to provide quality service across the organisation.
21. Apologize for errors, fix them quickly and explain what went wrong and why.
22. Make it clear that taxpayers can question the information, advice and service they are given and inform them of options available for resolving disagreements.
23. Monitor their performance in living these principles through collection of information and regular surveys, which are made public and used internally for continual improvement.

III. Conclusion

This Chapter and the next adopt a functional analysis of taxpayers' rights. As discussed in earlier chapters, the nature of each right depends in part on the nature of its enforcement. However, this Chapter has demonstrated that the very existence of any rights is largely dependent on the proper functioning of the tax system, which in turn, depends upon the effectiveness of the revenue authority. The particular context of each jurisdiction and its system of law and administration determines the powers and discretion given to the revenue authority. Nonetheless, there are certain critical elements that will govern the effectiveness of the tax system and a significant gap in any of these areas leaves the system open to abuse, ineffectiveness or both.

The most fundamental taxpayers' rights are congruent with the basic rights of the citizen (or tax resident) to good government. In the tax context, adherence to the IMF Code provides a broad framework of fiscal integrity necessary for an effective tax system. It has been shown that there are strong arguments supporting the benefits of improved governance of fiscal and revenue areas. Intervention in the system and the formal implementation of policies on governance should lead both to an increase in foreign direct investment and economic development.

An effective revenue authority is, of course, critical to the success of any government. A government's programmes rely on revenue. A government can implement laws to raise the revenue required, but this will only happen if there is effective assessment and collection of tax and enforcement of the tax laws. This Chapter has identified a number of elements fundamental to an effective revenue authority and the safeguarding of taxpayers' rights.

The structure of the body responsible for the general powers of administration of the tax system, whether autonomous or semi-autonomous, is not as important as its independence from external interference. The head of the

revenue authority should have security of tenure to ensure he or she does not face removal at the whim of the executive. The position should have the sole responsibility for revenue administration, with a reporting relationship that is non-partisan and does not allow executive interference.

Accountability is nonetheless vital. Tax administration should be characterised by transparency, integrity and the application of the principles of good governance. This requires oversight by groups that are not captured by special interests, but can ask the hard questions essential to maintain best practice. Oversight may be by way of such entities as legislative or executive committees, audit bodies, oversight boards with independent membership, statutory oversight positions or a combination of these.

However, the analysis also shows that without appropriate investment in revenue administration: autonomy and accountability are somewhat meaningless. Corruption and incompetence are rife where there is low investment in resources and personnel. Particularly in developing countries, investment has to be intelligent and appropriate to the environment. This might mean outsourcing aspects of the administration, such as information technology. But to safeguard taxpayers' rights and ensure that there is no corruption in the process, there must be stringent safeguards.

Equally important is appropriate training and development of revenue personnel. They need to have the knowledge to move beyond a formalistic interpretation of the rules to a broader understanding of the aspects of the tax rules that they are implementing. Only then can they apply them appropriately in accordance with principles of good practice to ensure effective compliance. Revenue officers need to understand and adopt a culture imbued with the values that will encourage taxpayers to comply voluntarily with the tax rules. For this the officers need training and a commitment to the values espoused by senior management.

Value driven statements of good practice are published by most revenue authorities, often in the form of Taxpayers' Charters. They generally include a statement of enforceable rights protected elsewhere. However, they also identify the attitude and approach that will be taken by the revenue authority and its officers in the administration of the tax system. By themselves these charters are worth little. However, if they are accompanied by the systemic protection designed to ensure independence, accountability and good governance, they are valuable. Not only do they articulate to stakeholders what they can expect in their relations with the revenue authority, but they give benchmarks against which the revenue authority can be judged. They are even more effective where they are accompanied by performance indicators.

Particularly for those rights that are no more than principles of good practice and are simply incapable of enforcement, performance indicators can provide feedback on how well intangible values are being given effect. In modern administration, feedback on perceptions or other indirect measures of performance, such as the number of complaints received, can play a significant role in guiding improvements. They also encourage transparency, articulate a performance commitment to stakeholders in the system and communicate the values that are so important to the good relationships that make the system work well. This Chapter lists the most widely used principles of good practice that are included in most charters of taxpayers' rights. They are included in an Appendix to the Model, with part of GAP002, which provides an example administrative charter of taxpayers' rights prepared by the OECD.

Chapter 6 set out the primary legal rights essential to the existence of an effective tax system. Chapter 7 has provided the framework for the tax administration and the principles that should govern its operation both at the structural level and in the implementation of its underlying values. Chapter 8 now gives a functional analysis of the legal and administrative rights that ensure the proper administration of the tax system. The whole provides an effective guide to best practice in tax administration.

CHAPTER EIGHT

Analysis of Secondary Legal and Administrative Rights

I. Introduction

This Chapter concludes the analysis of taxpayers' rights for inclusion in the Model. It continues the functional analysis begun in Chapter 7. The rights discussed cover the normal operations of a revenue authority on a daily basis. If a revenue authority provides taxpayers' with these rights, it is necessarily largely complying with the framework of principles set out in Chapter 3 and balancing the competing claims of those principles. The rights do not attempt to deal with detailed design of the tax system and therefore matters such as substantive horizontal and vertical equity. They do cover the principles that underlie the administration of the tax system: elements of each of: equity and fairness, certainty and simplicity, efficiency, neutrality and effectiveness. They also seek to provide a balance between the competing principles.

The rights set out in this Chapter implement more specifically the primary legal rights of Chapter 6. They provide the substantive content for the administration of a tax system supported by the framework identified in Chapter 7 (including the principles of good governance) and enable the integration of the principles of good practice. The rights are set out following the functions of the tax system: general administration; information gathering, audit and investigation; assessment; sanctions and enforced collection; and objection and appeal.

The rights comprise secondary legal rights, and primary and secondary administrative rights. Secondary legal rights focus on the specific operation of

the law, whether at a general level in providing a standard for its operation, or in the context of individual procedures and specific processes. These rights may also be protected as primary administrative rights, in which case the content may be broader but less certain. At a lower level of operation, secondary administrative rights provide a form of protection in the context of detailed processes and less formal interaction. The distinction is made clear as appropriate in the analysis that follows. In many cases, the level of enforcement will depend upon how the right is adopted in a particular jurisdiction.

The rights discussed in this Chapter flow from the essential functions and operation of tax administration. The literature on each of these areas is immense both at a general level and in each jurisdiction. They comprise many controversial areas of the law, such as legal professional privilege and the rule against self-incrimination. It is beyond the scope of this book to explore the detailed legal content of each area, the debates and controversies. It does not pretend to do so.

The aim of this book is to develop a model of rules of best practice. Each jurisdiction will adapt the Model to its own legal system and wider context.[1] It is therefore legitimate to draw from a particular reading of some of the literature those rules that seem to reflect best practice and can be so adapted. Any choice is necessarily idiosyncratic. However, that does not undermine the validity of making a choice, provided it follows a similar process to the requirements for the exercise of discretion set out below. The advantage of a Model of best practice is that it is just that. It provides a basis for reasoned argument, critical analysis and reflective development and improvement.

II. Administrative principles

A. The exercise of discretion

1. The nature of discretion

The principle of legality requires the imposition of tax in accordance with the law. In Chapter 6 it was argued that under the legality principle there should

[1] For a very useful analysis of contextual application of different aspects of tax administration, *see* R.M. Bird, 'Administrative Dimensions of Tax Reform' (2004) 10 *Asia-Pacific Tax Bulletin*, 134.

be clear limits on discretion and a framework for its exercise. Discretion normally relates to process rather than the imposition of tax. However, revenue authorities may in many jurisdictions legitimately exercise discretion, for example, as to the level of penalty applicable. The revenue authority may also follow settlement procedures that allow a taxpayer in some circumstances to pay less than the legally stipulated tax due. The detail of when and how this is appropriate is dealt with below. However, the examples illustrate that although discretion is largely procedural, it can govern matters of substance.

In Chapter 6 it was also noted that the exercise of discretion is more common and broader in scope in common law jurisdictions than the more formal and legal approach to administrative law in many civil law jurisdictions. The body of law in both types of jurisdiction is useful in deriving the principles that should apply to the administrative exercise of discretion. The starting point of common law administrative law is generally to define the avenues available to challenge government action and to identify the remedies applicable where the action is unlawful.[2] In defining taxpayers' rights, the result may be the same, but the starting point is to define appropriate criteria for lawful and appropriate decision-making. This is more akin to the civil law approach.

Defining appropriate criteria takes place, essentially, at two levels. On one level there are specific criteria, which may differ depending upon the type of decision being made and the nature of the decision-maker. Most of the criteria governing the decision to allow a settlement of a significant tax dispute with a major corporation are going to differ from those governing the decision whether a telephone request from a taxpayer asking a relatively insignificant question is an oral binding ruling. However, at a higher level, there are arguably basic principles that should provide a framework for any administrative decision. This is the approach adopted under the administrative law of many jurisdictions.

In one of the more extensive studies of the theory behind common law discretionary powers, Galligan supports this view and argues that one such principle 'is that officials to whom powers have been delegated must account for their actions to the community'.[3] Even in undemocratic states, this is particularly true of the tax system. Earlier chapters have highlighted that it is important for voluntary compliance that taxpayers perceive the tax system

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2 H.W.R. Wade and C.F. Forsyth, 'Administrative Law' (8th edn., Oxford, OUP, 2000), p. 4.

3 D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford, OUP, 1986), p. 4.

as broadly fair. Aspects of this are political, but there is a strong requirement for legal accountability wherever a decision is delegated and requires the decision-maker to exercise discretion.

The nature of principles is that they are not precise and they overlap.[4] Broadly, Galligan suggests that decisions should be: rational or reasonable; directed towards serving the purpose or end for which the decision-making power was conferred; and compliant with general considerations of morality.[5] Perhaps the most important concept flowing from the last point is that 'the rights and interests of individuals be treated with understanding and respect' and from this, in turn, flow principles such as fairness and non-discrimination.[6] This can be seen in German administrative law.[7] It places emphasis on controlling discretionary power both generally and in the tax courts to manage very carefully the interaction between the revenue authority and the individual along these lines, while protecting the integrity of state power. This analysis is consistent with the protection that the administrative law provides to those who are affected by decisions that require the exercise of discretion.[8] It also coincides with the principles that underpin decision-making in tax administration.

It is worth reiterating that it is only where a decision-maker may exercise discretion that these principles apply. Most substantive tax decisions and many procedural tax decisions are matters of law governed by rules. It is not up to the revenue authority to decide differently from the rule, however, irrational, unfair or lacking in purpose the rule may seem.[9] The making of tax rules should be governed by the primary legal rights set out in Chapter 6, which should prevent such problems with rules. If primary legal rules are not in place

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4 R.M. Dworkin, *Taking Rights Seriously* (London, Gerald Duckworth and Co, 1977), pp. 31-39, pp. 68-71 and D.J. Galligan, ibid., p. 5.

5 D.J. Galligan, above n. 3, p. 5.

6 Ibid.

7 *See generally*, J. Schwarze, *European Administrative Law* (London, Sweet and Maxwell, 1992) and C. Daiber, 'Protection of Taxpayers' Rights in Germany' in D. Bentley (ed.), *Taxpayers' Rights: An International Perspective* (Gold Coast, Revenue Law Journal, 1998), p. 152 and p. 167.

8 *See* the comprehensive analysis of Diplock LJ in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 at 408.

9 As was stated, *e.g.*, by the Canadian Federal Court of Appeal in *Ludmer v. The Queen* 95 DTC 5311 (FCA) at 5317. Although *see* the discussion on UK extra-statutory concessions in S. Eden, 'Judicial control of tax negotiation' and N. Lee, 'The Effect of the Human Rights Act 1988 on Taxation Policy and Administration', papers presented at the 6th International Conference on Tax Administration, Atax (Sydney, 15-16 April 2004).

to do so, then political accountability comes into play and must deal with the problem, whether through the formal political process or informally, through rising levels of non-compliance, as described in Chapter 7.

2. A framework for the exercise of discretion

To enable a revenue authority to be effective and comply with the principles of good governance outlined in Chapter 7 requires an emphasis on high level recruitment, training and motivation of revenue officers.[10] The principles of good practice discussed in Chapter 7 will only work if there is a culture in place to support them, which is why there is such a strong emphasis in revenue authority business plans on outcomes, performance and quality service delivery. A strong quality-focused and service-oriented culture is equally important when it comes to the exercise of discretion. CIAT makes this clear, for example, in its 'Minimum necessary attributes for a sound and effective tax administration'.[11] It places significant emphasis on strengthening the human resources of a revenue authority, including the environment in which revenue staff work.[12]

Where decision-makers have the training and ability to make decisions, there is nonetheless a requirement to follow certain processes in decision-making in order to reach an appropriate decision. The large body of administrative law devoted to the process of decision-making demonstrates that it is by no means straightforward. The development of English administrative law has seen a number of cases that set out the basic principles governing delegated decision-making. The principles reflect those often found in other jurisdictions, particularly in the common law family. Lord Greene MR in *Associated*

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[10] For example, L. Barbone, A. Das-Gupta, L. De Wulf and A. Hansson, 'Reforming Tax Systems: The World Bank Record in the 1990s', World Bank Policy Research Working Paper 2237, November 1999, <www.worldbank.org/wbi/governance/wp-governance.html>, 1 October 2006; OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches* (Paris, Centre for Tax Policy and Administration, 2006); OECD, *Strengthening Tax Audit Capabilities: Auditor Workforce Management — Survey Findings and Observations* (Paris, Centre for Tax Policy and Administration, 2006).

[11] Approved on 19 March 1996 by the CIAT General Assembly, Santo Domingo, Dominican Republic, <www.ciat.org>, 1 October 2006.

[12] Discussed further in the 'Conclusions of the CIAT Executive Council's Petit Comité' at its meeting of 3 December 1999, <www.ciat.org>, 1 October 2006.

Provincial Picture Houses Ltd v. Wednesbury Corporation[13] emphasised that the decision-maker is required to come to a reasonable decision, taking account of certain matters in reaching a decision and not taking account of others. Lord Hailsham LC in *Chief Constable of the North Wales Police v. Evans*[14] added the requirement that the individual must be given fair treatment by the decision-maker. The essence is that decisions should be reasonable, based on criteria or standards, and fair.

Galligan reaches the same conclusion from a theoretical analysis. He argues that the precepts of decision-making require at a minimum:[15]

> (a) that any exercise of powers be based on reasons, and that the reasons be applied consistently, fairly, and impartially; (b) that the reasons be intelligibly related to a framework of equally intelligible purposes, policies, principles, and rules (in general, standards) which can be seen fairly to fall within and be the basis of delegated authority; (c) that in matters of procedure and substance there be compliance with general, critical considerations of morality. Around these foundations more detailed and specific principles can be created. Their significance is that they go towards regulating the relationship between citizens and the state by stipulating the processes and principles that must be satisfied if the exercise of official powers is to be considered justifiable and legitimate. In particular they eliminate decision-making by whim, caprice, chance, or ritual; they provide the basis for identifying and eliminating arbitrariness, for developing general standards in making decisions, and for extending the requirements of fair procedures; and they open the processes of decision-making to external public scrutiny. There is then a focal point from which the decision-maker can have a critical view of his own decisions, and there is a basis for legal and judicial controls.

Decisions made in this way comply with the basic principles set out in Chapter 3. Taxpayers would generally perceive decisions made as fair. The process ensures that decisions are not arbitrary, are transparent, and taxpayers can anticipate in advance the way a decision affecting them will be made, even if the outcome is still dependent on the exercise of the discretion. A clear process of this kind is efficient and helps to reduce both compliance and administration costs. Consistency facilitates business decisions. Timely

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13 [1948] 1 KB 223 at 228-234.

14 [1982] 3 All ER 141 at 143.

15 D.J. Galligan, above n. 3, p. 6.

decision-making is a factor in an assessment of reasonableness, particularly in the tax context, because it contributes to return on the use of funds. Most important, discretion is often given to revenue authorities to ensure that the tax system is effective in a dynamic environment. A proper process ensures that the rights of the taxpayer can be balanced against the requirement to safeguard the collection of revenue in a way that is both fair and seen to be fair.[16]

Galligan comes from a common law background. Yet the general theoretical approach is not dissimilar in this narrow sphere from the civil law tradition. The difference in approach between the Model and common law administrative law is that the Model sets out the requirements for the effective exercise of discretion, whereas administrative law sets out the requirements for review of the exercise of discretion. The latter is narrower in scope, although the reasons for review inform the criteria governing the appropriate exercise of discretion.

In his comparison of the common and civil law administrative traditions, Thomas' analysis suggests that the Model is more aligned to the civil law tradition.[17] He states, for example, that French administrative law starts with the notion that the administration should be constrained by those limitations 'necessary to protect the individual in light of the needs of public administration'.[18] German administrative tradition is distinctly different. However, the point of departure for German administrative law is also the concept of protecting the subjective rights of individuals from the exercise of state power and discretion; a protection subsequently reinforced by strong judicial review.[19] It is an approach accepted by the European Community as it has sought to blend different administrative law practice.[20] As such, it provides justification for the Model to provide guidance for the exercise of discretionary decision-making powers themselves rather than for how a court might subsequently review such decisions.

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16 Although G. Turley, *Transition, Taxation and the State* (Aldershot, Ashgate, 2006), p. 113 argues that in transition countries, it is important for effectiveness to reduce the discretionary power of tax officials and inspectors.

17 R. Thomas, *Legitimate Expectations and Proportionality in Administrative Law* (Oxford and Portland, Hart Publishing, 2000), p. 1 *et seq*.

18 Ibid., p. 15.

19 Ibid.

20 Ibid., p. 19. *See also* the discussion in H.W.R. Wade and C.F. Forsyth, above n. 2, ch. 7 on the increasing and significant changes foreshadowed by the incorporation of European Law into the UK common law.

3. Criteria governing the exercise of discretion

The broader legal constraints governing the exercise of discretion are discussed in Chapter 6 and covered by Article 5 of the Model. This would cover such issues as the legality of decisions, acting beyond the powers of the decision-maker and the improper legal exercise of discretion.[21] It also covers the principles of non-discrimination and proportionality.

Using Galligan's analysis, the first criterion governing the exercise of discretion is that any exercise of powers should be based on reasons, which are applied consistently, fairly, and impartially. There is no general requirement to give reasons in administrative law,[22] but increasingly in revenue administration, the requirements of consistency, fairness and impartiality demand it. To ensure the operation of an effective tax administration it is important to explain tax decisions to provide transparency, certainty and to encourage taxpayers to see the system as fair. It is clear from the discussion in Chapter 7 that revenue authorities, themselves, see their commitment to explain decisions to taxpayers as fundamental.[23]

If reasons are to be given, what are the characteristics that they should have? Implicit in the giving of reasons is that they should be rational and logical. It is not always clear to a decision-maker when a decision is made that it is illogical or irrational. However, that the decision-maker must address the additional requirements of consistency, impartiality and fairness overcomes obviously illogical and irrational decision-making. Review mechanisms provide added protection. For example, in the common law it falls within the grounds for judicial review of administrative decisions.[24] However, the provision of both dispute mechanisms and recourse to a Revenue Ombudsman under Article 11 of the Model ensures that taxpayers can raise such issues without having to go first to the courts, which can be too costly for many taxpayers in time and money.

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21 R. Creyke and J. McMillan, *Control of Government Action* (Chatswood, LexisNexis Butterworths, 2005), p. 366 *et seq*.; R. Douglas, *Douglas and Jones's Administrative Law* (5th edn., Sydney, The Federation Press, 2006), p. 367 *et seq*. and p. 630 *et seq*. and J. Jowell, 'The Legal Control of Administrative Discretion' [1973] *Public Law*, 178.

22 For example, *see* H.W.R. Wade and C.F. Forsyth, above n. 2, p. 517.

23 *Taxpayer Rights and Obligations — Practice Note* (GAP002) (Paris, OECD, 2001), <www.oecd.org>, 1 October 2006.

24 R. Douglas, above n. 21, p. 446.

The requirement that decisions be applied consistently, fairly and impartially accords with the principles set out in Chapter 3, addressing in particular: perceptions of fairness, certainty, the rule against arbitrariness, transparency and efficiency. Many revenue authorities provide advance tax rulings, often with extensive explanations, to cater for this demand. However, there is a clear understanding among revenue authorities that the principles of good practice discussed in Chapter 7 increasingly demand that any decision given should reflect these characteristics. Inconsistent application of the law leads to a breakdown in trust. Perceptions of unfairness where taxpayers in the same position are treated differently can lead both to concerns as to the integrity of the system and to increased non-compliance.[25] Partiality reflects not only bias, but the threats of arbitrariness and corruption, as discussed in Chapter 7.[26] The first criterion is therefore consistent with good practice in tax administration.

From a practical standpoint this raises important questions in relation to resources, management, structure and organisation within a revenue authority. The CIAT 'Minimum necessary attributes for a sound and effective tax administration' mentioned above, focus heavily on the requirements necessary to guarantee integrity, impartiality and taxpayer trust. Many of these relate to training, resources, systems and procedures. It follows on from the discussion on principles of good tax practice in Chapter 7.

Revenue authorities recognize the importance of encouraging these principles. In 2006, South Africa introduced a legally binding ruling system, 'intended to promote clarity, consistency and certainty'[27] and following the example of countries such as Australia and New Zealand. However, with the best intentions, even the most sophisticated OECD revenue administrations struggle to achieve consistency. In Canada, for example, an audit in 1993 of the relatively new GST ruling system found that 'in an unmatured system ... the risk of issuing inconsistent or inaccurate rulings and interpretations is

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[25] *See*, *e.g.*, N. Brooks, 'The Challenge of Tax Compliance' in C. Evans and A. Greenbaum (eds.), *Tax Administration: Facing the Challenges of the Future* (Sydney, Prospect, 1998), p. 7. In the context of the exercise of discretion in transfer pricing disputes, *see* F.M. Allegra, 'Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review' (1994) 13 *Virginia Tax Review*, 423.

[26] *See*, *e.g.*, Turley's analysis of corruption in 25 countries in transition in G. Turley, above n. 16, pp. 97-123 and L. Rakner and S. Gloppen, 'Tax Reform and Democratic Accountability in Sub-Saharan Africa', paper presented at an IDS Taxation Seminar (28-29 October 2002), p. 6, <www.ids.ac.uk/gdr/cfs/activities/Taxation-Seminar.html>, 1 October 2006.

[27] Media Release, 23 September 2006, <www.sars.gov.za>, 1 October 2006.

relatively high. The decentralization of interpretation services . . . increases the risk of inaccuracies in rulings and interpretation'.[28]

Although institutionally it is difficult to achieve complete consistency and fairness,[29] there are two levels of response: organisational and individual. Organisationally, for example, it is important to ensure that systems are in place to enable consistent, fair and impartial decision-making across the revenue authority.[30] This will require sufficient resources to allow decisions made in one part of the organisation to be made available to decision-makers making similar decisions in other parts. It will require adequate training of both decision-makers and those responsible for collating and disseminating information. It will require taxpayer education so that the information provided by taxpayers and upon which decisions are made is sufficient to ensure consistency. Individually, however, it will require training for decision-makers so that whatever the resources, systems and information available to them, they make the best possible decision that they can make on the basis of the information before them.[31]

This leads directly into Galligan's second criterion, paraphrased as: the reasons given for a decision should be intelligibly related to a framework of equally intelligible standards that can be seen fairly to fall within and be the basis of delegated authority. The criterion sets out how a decision should be made. Any decision-maker is constrained by the extent of the discretion afforded. Within the parameters constraining the exercise of discretion, how should the decision-maker approach her or his task? The essential point established by Galligan here is that no decision is made in a vacuum. There are rules, principles, policies, guidelines, precedents and other factors that inform the context and framework within which a decision is made.[32] All of these

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[28] Auditor General of Canada, *1993 Report of the Auditor General of Canada — Department of National Revenue*, ch. 20, <www.oag-bvg.gc.ca/domino/reports.nsf>, 1 October 2006.

[29] *See, e.g.*, in Australia, *The Treasury, Report on Aspects of Income Tax Self Assessment* (Canberra, The Treasury, 2005), <selfassessment.treasury.gov.au>, 1 October 2006.

[30] One of the purposes of the work carried out by the OECD, *see* OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10; OECD, *Strengthening Tax Audit Capabilities: Auditor Workforce Management*, above n. 10.

[31] That this is vital in the broader context of tax administration can be seen in G. Turley, above n. 16, and in a specific country example, J.K. Hyun, 'Mongolia: Reform of the Tax Audit System', (2006) 12 *Asia-Pacific Tax Bulletin*, 341.

[32] For an extensive discussion of theories of the model of rules and discretionary authority, *see* D.J. Galligan, above n. 3, p. 56 *et seq*.

elements can usefully be described as constituting standards, which, using Galligan's criterion, should form the basis for any decision.

Given the breadth of formal and informal rules and other influences on any decision, how does a decision-maker determine a hierarchy of their importance in reaching a decision? Modern management and decision-making processes have made this determination much easier based on substantial theoretical work on structuring discretion.[33] The extent of the influences on a decision is confined by the context, particularly at lower levels of decision-making. Many of the decisions can be confined strictly within certain parameters and if they fall outside the designated areas within which a decision can be made, they are escalated to a higher level decision-maker.[34] The decision-making process is highly structured and manuals, check-lists, databases and comprehensive procedural guidelines are in place across revenue authorities and within individual areas to facilitate high quality decision-making across the organisation. The quality of the process is maintained through checking mechanisms by both peers and officers at a higher level. Fairness is increasingly enhanced by the transparency in revenue decision-making processes.[35]

Two types of problem can arise from this approach. First, it does not guarantee that revenue officers will follow it. A number of studies of reforms of tax administration in developing countries note the difficulty in making revenue officers follow the rules where the culture within the tax administration and the broader environment do not reinforce adherence to the rules.[36]

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[33] Pioneered by K.C. Davis, *Discretionary Justice* (Baton Rouge, Louisiana State University Press, 1969) and discussed extensively in D.J. Galligan, ibid., p. 167 *et seq*.

[34] These form part of the operational guidelines within almost every revenue authority and are reflected in the CIAT, 'Minimum Necessary Attributes for a Sound and Effective Tax Administration', above n. 11, *e.g.*, p. 6: 'Actions, methodology and performance standards system implemented and in operation for management control'.

[35] CIAT, ibid. The extent of consultation in developing internal guidelines is quite remarkable in some revenue authorities. Although it could be argued that some of this is window dressing, the range of avenues for community input in jurisdictions such as Australia, New Zealand and Canada ensures that taxpayers are very satisfied with their revenue authorities: *see* the detailed discussion under the heading, 'Principles of Good Practice' in Chapter 7.

[36] For example, F.D.A.M. Luoga, 'Taxation in the Advent of Democratisation and Transition to Free Market Economy in Tanzania and Concerns on the Rule of Law and Human Rights' Law, Social Justice and Global Development, p. 31, <elj.warwick.ac.uk/global/issue/2002-1/luoga.html>, 1 October 2006; M. Moore and L. Rakner (eds.), 'The New Politics of Taxation and Accountability', 33(3) (July 2002) *IDS Bulletin*; G. Turley, above n. 16 and J.K. Hyun, above n. 31, p. 347.

This is a systemic issue that needs resolution whether or not discretion is given to revenue officers.

Second, structured decision-making can encourage a technical or mechanical application of the relevant standards.[37] It is a problem if appropriate exercise of discretion is constrained so that it does not take account of the particular factors relevant to a particular case that distinguish it from other cases of the same kind. This can be overcome by effective training of personnel, a system of escalation of more complex matters to revenue officers with more experience and a system of checking and approving decisions at a higher level, before they are sent out. This step is also important as it ensures that, in their review, higher level revenue officers can take appropriate account of policy, legislative and other developments that might impact on the decision.[38]

The use of procedures, manuals and checklists to aid in decision-making does not obviate the exercise of discretion, but it makes it manageable. It also does not prevent a mix of approaches to decision-making. A decision on an objection against an assessment may be relatively easily dealt with on the information provided in accordance with a set of fairly specific standard procedures. A decision on an advance ruling request in a complex technical area might require a range of activities by the revenue officer in coming to a decision. They might include: discussions and even negotiations with the taxpayer to understand and refine understanding of the question and the relevant facts; research using a range of libraries, databases and the experience of other officers; and conferencing with senior officers from different locations and sections. Standard procedures in answering a complex advance ruling request may be comprehensive, but can still be framed sufficiently broadly to cater to a multi-step process incorporating substantial information from numerous sources.[39]

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[37] This is the case in all institutional decision-making. *See* the tension in the European Court of Human Rights between objective and subjective approaches to interpretation, particularly during Sir Gerald Fitzmaurice's term as a judge; described in C. Ovey and R.C.A. White, *Jacob's and White: The European Convention on Human Rights* (4th edn., Oxford, OUP, 2006), p. 52 *et seq*.

[38] D.J. Galligan, above n. 3, p. 169 *et seq*. He notes at p. 178 that 'the risk of arbitrariness is high ... where powers are exercised by officials whose expertise and training are limited, and whose decisions are unlikely to be reviewed or checked in a systematic way by other officials.'

[39] For example the Advance Pricing Agreement process, *see* M. Markham, *The Transfer Pricing of Intangibles* (The Hague, Kluwer Law International, 2005), p. 231 *et seq*.

The essence of this approach is to ensure the best quality decisions can be made in a complex and changing world. Structure and constraint in decision-making, when properly applied, addresses the common concerns that decision-makers can use their powers for improper purposes, take account of irrelevant considerations in reaching their decisions and not relate the reasons they give to the standards used.[40] To avoid misuse of discretion in more complex matters, where the standards are less specific, it is important to escalate the decision to more senior revenue officers. The requirement for reasons and the transparency that comes with it, places an obligation on the decision-maker that helps to focus attention not just on making the right decision, but being able to justify it.

At a higher level of abstraction, there is an overarching requirement of reasonableness required for intelligible reasons to fit within intelligible standards that fairly fit within the scope of the discretion. The common law concept of reasonableness, which can be used to exclude irrationality, discrimination and disproportionality,[41] is extended in the civil law by the principles of proportionality and legitimate expectation.[42] Although the common law does not have the clear theoretical rationale for the application of the reasonableness principle, the civil law aim of ensuring that there is an optimal balance between public administration and social interests and the safeguarding of individual interests is inherent in proper decision-making within any tax administration.[43]

The broader concept of reasonableness relates also to the third Galligan criterion: that in matters of procedure and substance there be compliance with general, critical considerations of morality. This may perhaps be better expressed for our purposes: that discretionary power should be exercised fairly and reasonably in matters of procedure and substance.[44] It returns to the fundamental principle of Chapter 3, that it is important that the public perceives the tax system as fair.[45]

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40 R. Douglas, above n. 21, p. 399 *et seq.*

41 R. Douglas, ibid., p. 461 *et seq*. and R. Creyke and J. McMillan, above n. 21, p. 304 *et seq*.

42 R. Thomas, above n. 17, p. 15.

43 Ibid., for a discussion of the differences in theoretical approach, p. 1 *et seq*. and for a common law analysis, *see* M. Paterson, 'Legitimate Expectations and Fairness: New Directions in Australian Law' (1992) *Monash University Law Review*, 70.

44 Explored in depth in D.J. Galligan, *Due Process and Fair Procedures* (Oxford, Clarendon Press, 1996).

45 B. Torgler, 'Tax Morale and Tax Compliance: A Cross Culture Comparison', in National Tax Association, Proceedings: Ninety-Sixth Annual Conference 2003

What does this mean in practice? The common law tends to define reasonableness to mean what is not unreasonable.[46] Although Lord Hailsham LC underlines the difficulties in defining reasonableness, as two reasonable people can reasonably come to opposite positions on the same set of facts,[47] the core content of what is fair and reasonable is generally understood and has changed little over the years. Coke CJ in 1598 said that the exercise of discretion in reason and law:[48]

> is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

This concept is accepted by revenue authorities. It is the substance underlying, for example, the ATO 'core values of fairness and professionalism; transparency and accountability; and consultation, collaboration and co-design'.[49] It is why the ATO, like other revenue authorities, seeks affirmation of taxpayer perceptions that it is fair and reasonable in the exercise of its powers. The ATO is proud that in 2006, of over 1,500 businesses surveyed 72 per cent said that the ATO administers the tax system fairly and 88 per cent said that the ATO treats them in a fair and impartial way.[50] Even those revenue authorities in jurisdictions with governments ranking higher on corruption indexes recognize these values. For example, as noted in Chapter 7, the Zimbabwe Revenue Authority website has as its banner headline, 'Integrity, Transparency, Fairness: We are here to serve'[51] and the Kenya Revenue Authority highlights on

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(Washington DC, National Tax Association, 2004), p. 63, p. 72, notes, *e.g.*, that in a cross-cultural study involving empirical data gathered from both Costa Rica and Switzerland, there was a strong positive correlation between taxpayers' trust in the government and legal system and tax morale, leading to the conclusion that compliance is higher in jurisdictions with a government and legal system that are seen as fair and supportive of their taxpayers.

46 *See*, *e.g.*, R. Douglas, above n. 21, p. 461 *et seq*., R. Creyke and J. McMillan, above n. 21, p. 724 *et seq*. and H.W.R. Wade and C.F. Forsyth, above n. 2, p. 353 *et seq*.

47 Re W. (An Infant) [1971] AC 682, 700.

48 (1598) 5 Co. Rep. 99b, quoted with approval in H.W.R. Wade and C.F. Forsyth, above n. 2, p. 353.

49 M. D'Ascenzo, speech to the International C.F.O. Forum (Sydney, Australia, 19 October 2006), <www.ato.gov.au>, 1 November 2006.

50 Eureka Strategic Research, *Business Perceptions Survey Wave 9*, <www.ato.gov.au>, 1 November 2006.

51 <www.zimra.co.zw>, 1 October 2006.

its website its annual survey to help it provide better quality service to its customers.[52]

To be fair and reasonable encompasses such aspects as proportionality: administrative measures must not unnecessarily or disproportionately interfere with individual rights to achieve their aim.[53] It extends to procedural fairness or natural justice, which has been recognized as a 'kind of code of fair administrative procedure' in the common law.[54]

One of the more important elements of reasonableness not dealt with elsewhere is the principle of legitimate expectations. It has been accepted in the common law[55] and reflects a longstanding civil law principle that protects those legitimate expectations that have been raised through administrative conduct.[56] Particularly important in the tax context, it does not extend to subjective hope or an implied promise, but it can arise as a result of administrative inaction.[57] It is an element of reasonableness and the courts will only entertain expectations that are reasonable in the light of all the circumstances.[58]

Whether the legitimate expectation induced can operate when it falls outside the power of the revenue authority will depend upon the law of the jurisdiction. In Germany, the expectation can be fulfilled through a principle that allows the balancing of the interests of legality and legal certainty, while Netherlands courts will allow reliance on the expectation provided the interests of third parties are not affected.[59] The UK follows the European Court of Justice and 'balances the protection of the general public interest against the individual's legitimate expectations'.[60] This has seen a number of extra-statutory concessions made by the Inland Revenue upheld by the courts for the sake of fairness even though they are contrary to the law.[61]

Fairness extends to matters of legal certainty in the considerations of the European Court of Justice. In *Gebroeders van Es duoane Agenten BV v.*

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52 <www.kra.go.ke>, 1 October 2006.

53 H.W.R. Wade and C.F. Forsyth, above n. 2, p. 368 *et seq*. and R. Thomas, above n. 17, p. 77.

54 H.W.R. Wade and C.F. Forsyth, above n. 2, p. 435.

55 H.W.R. Wade and C.F. Forsyth, above n. 2, p. 370 and p. 494. *See* R. Thomas, above n. 17 for a comprehensive analysis of the common and civil law positions.

56 Ibid.

57 R. Thomas, above n. 17, p. 53.

58 Ibid., p. 55.

59 Ibid., p. 56.

60 H.W.R. Wade and C.F. Forsyth, above n. 2, p. 499.

61 Ibid., p. 408 and S. Eden and N. Lee, above n. 9.

Inspecteur der Invoerrechten en Accijnzen,[62] the Commission failed to amend a regulation concerning tariff nomenclature when it was required to do so. This resulted in uncertainty on the part of the individuals as to their legal obligations, and had the consequence that the Court held that the regulation could not thereafter be applied. For fairness, the European Court of Justice also requires adequate notice before administrative and legislative measures can take effect.[63] Although, exceptionally, a Community measure may take effect before its publication where the purpose to be achieved and legitimate expectation demands it.[64]

The Model should adopt Galligan's criteria for the exercise of discretion in Article 6. From the analysis it should include the reasonableness and fairness requirement. The meaning extends to cover the principle of legitimate expectation. Legitimate expectation also falls within the concept of certainty in rulemaking, covered in Article 9 of the Model.

B. The principles of reasonable time and reasonable notice

Whenever a taxpayer is entitled to a decision or action by the tax authority, it should occur either within a specified period or within a reasonable time. Likewise, whenever a taxpayer is required to do something, provide information, or otherwise assist the revenue authority, it should be after the taxpayer is given reasonable notice, unless it is clear that such notice would reasonably impact on the success of the relevant administrative action. This latter point is dealt with more fully in the context of search and seizure.

Statistics contained in the reports from the Ombudsman office in most jurisdictions suggest that delays, errors and misunderstandings form the greater part of the work of these offices.[65] Tax legislation, by virtue of the requirement of legal certainty, sets out numerous time limits within which taxpayers must fulfil their obligations. It is less helpful in providing time limits within

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62 [1996] E.C.R. I-431

63 Case 98/78 [1979] E.C.R. 69, 84.

64 Case 99/78 [1979] E.C.R. 101, 111.

65 For example, the annual reports of: the Australian Commonwealth Ombudsman, <www.comb.gov.au>, 1 October 2006; the Irish Office of the Ombudsman, <ombudsman.gov.ie>, 1 October 2006; the UK Adjudicator's Office, <www.adjudicators office.gov.uk>, 1 October 2006; and the US National Taxpayer Advocate, <www.irs.gov>, 1 October 2006.

which the revenue authority must act outside formal procedures. This is appropriate, as much of the point in giving the revenue authorities powers to administer the tax system would disappear if administrative procedures were legislated.

Revenue authorities recognize the obligation that they have to act fairly, efficiently and effectively. It is not in the best interests of good administration for administrative delays to form the bulk of complaints about the tax system. The OECD GAP002 sets out in its model administrative charter a number of rights for which specific turnaround times should be inserted and a number of others that should be dealt with 'as quickly as possible'.[66] This is reflective of most tax administrations, which use published key performance indicators, as discussed in Chapter 7, to measure and improve their administration.

The principles of reasonable time and reasonable notice underpin the CIAT, 'Minimum necessary attributes for a sound and effective tax administration'.[67] There is therefore widespread acceptance of their importance to good tax administration. However, it is also important that they are articulated as general principles, rather than simply specified as a particular requirement for particular actions. As a general principle, they can cover a range of actions for which a specific time period is inappropriate, especially when an action depends upon particular facts and circumstances. Ideally, the principles would be legislated to provide the option of judicial review. However, if it is felt strongly in a jurisdiction that this is inappropriate, they should at least be articulated clearly and given administrative enforceability through the dispute resolution mechanisms identified in Article 11 of the Model.

C. The principle of fairness in administrative action

There are certain generally accepted rules of fairness governing administrative action.[68] We have seen that in the common law they are articulated in terms of review of administrative action;[69] in the civil law administrative

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66 Above n. 23, p. 8.

67 Above n. 11, p. 7.

68 F. Vanistendael, 'Legal Framework for Taxation', in V. Thuronyi (ed.), *Tax Law Design and Drafting*, vol. 1 (Washington DC, International Monetary Fund, 1996), p. 21 and M. McLennan, 'The Principles and Concepts in the Development of the Taxpayers' Charter' (2003) 32 *Australian Tax Review*, 22, 31.

69 For example, *see* H.W.R. Wade and C.F. Forsyth, above n. 2.

procedure is usually clearly set out in a code.[70] The rules of fairness apply to most administrative procedures considered in the Model. Although each jurisdiction will have its own procedures under its administrative law,[71] the Model sets out the general minimum standard expected for administrative procedures applicable to taxpayers. There will be variations: certain search and seizure actions undertaken by revenue authorities may not fulfil all of these requirements. It is important to establish a standard for administrative actions so that variations from the standard have to be justified.

A useful example of a code that melds many of the common and civil law principles is the South African Promotion of Justice Act 2000.[72] The Constitutional basis for the Act is set out in the Preamble and is found in section 33 of the Constitution of the Republic of South Africa. It provides 'the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action'. Section 3 of the Act sets out the requirements for procedurally fair administrative action and requires:

(a) adequate notice of the nature and purpose of the proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons.

This is a straightforward, simple and clear statement of requirements that are generally accepted. They are contained in slightly different ways in almost every charter or statement of revenue administration practice.[73] This formulation is therefore used in the Model.

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70 C. Daiber, above n. 7, p. 165 and R. Thomas, above n. 17, p. 13. But *see* also the 'Order Concerning Implementation Standards and Rules for the Work of the National Tax Agency' in Japan, in National Tax Agency, *An Outline of Japanese Tax Administration*, p. 3 *et seq.*, <www.nta.go.jp>, 1 October 2006.

71 For example, G. Richardson, 'An Analysis of the Impact of Tax Fairness Perceptions on Tax Compliance Behavior in a Non-Western Jurisdiction: The Case of Hong Kong' paper presented at the 6th International Conference on Tax Administration (Sydney, Australia, 15-16 April 2004).

72 The implications are explored further in the context of the South African Constitution by B. Croome, 'Constitutional Law and The Taxpayer's Rights in South Africa — An Overview' 2002 *Acta Juridica*, 1.

73 *See*, *e.g.*, A. Kitnitchiva, 'Accountability and Fairness in Tax Administrations — A Case Study of the Thailand Revenue Department' (2006) 12 *Asia-Pacific Tax Bulletin*, 76.

D. The principles of publication, dissemination and education

Article 6 of the Model requires that all rules applicable in the tax system shall be compiled and published accurately and in a form that is accessible to all users. It is fundamental to the effective operation of the tax system.[74] Unless taxpayers know that they are required to pay tax in a particular situation and know how to go about it, it is difficult for them to comply. As tax compliance research has developed, it has become increasingly self-evident that compliance improves with publication and dissemination of information, and with taxpayer education.[75]

There is a strong emphasis on information dissemination generally, but particularly to assist in any major change process. Change in tax systems is a constant and information dissemination and education is essential if taxpayers are going to perceive the system as fair. The more information that is available, the more certain are taxpayers of their duty to comply with the obligations that the tax system places upon them. If the information is simple to understand and designed to reach all types of taxpayer, including those in minority groups, with limited education or particular disabilities, it can provide greater certainty and comfort with the system. It also becomes more effective in collecting the tax due and more efficient in reducing the burden on taxpayers as they go through the process of complying with the law.

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[74] OECD, *Taxpayers' Rights and Obligations — a Survey of the Legal Situation in OECD Countries* (Paris, OECD, 1990) ('OECD Taxpayers' Rights and Obligations'), para. 2.16.

[75] The general compliance literature and papers at successive conferences on international tax administration reflect this: e.g., the annual IRS Research Conferences (US) biennial ATAX International Tax Administration Conferences, (Sydney, Australia) and the Tax Research Network Annual Conferences (UK). It is essential to the proper operation of self-assessment and the successful introduction of reform. *See*, *e.g.*,: J. Alm, B. Jackson and M. McKee, 'Audit Information Dissemination, Taxpayer Communication, and Compliance: An Experimental Approach', paper presented at 2004 IRS Research Conference (Washington DC); D.R. Vos (Australian Inspector-General of Taxation), 'The Importance of Certainty and Fairness in a Self-assessing Environment' and M. Redmond, 'Ireland — a Case Study in Tax Administration Change Management', papers presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006); and C. Richardson, 'Administrative Burdens and Simplification in HMRC', paper presented at the Tax Research Network Annual Conference (Southampton, UK, 2006).

Most revenue authorities have extensive school and community education programmes.[76] The internet has transformed revenue authorities' ability to provide massive amounts of information relatively cheaply and easily to those who have access.[77] Publication, dissemination, education and assistance are seen as necessary attributes for a sound and effective tax administration.[78] They should be recognized as principles underlying the tax administration.

The consequence of recognising these principles would not be to open a floodgate of challenges to revenue decisions on the basis that proper information was not provided. This option would only be open, in most cases, where a taxpayer could show the adjudicator in the administrative dispute resolution process that there was a genuine lack of information available. Errors and misunderstandings through too little or misinformation are already a significant component of the work of an ombudsman office.[79] Rather, it would provide general underlying principles to assist in the process of administrative dispute resolution. It would also allow the revenue authority to support budgetary claims for additional resources for an essential component of its administration.

E. The principles of assistance and providing for special needs

The fairness principle reinforces the wider prohibition in most jurisdictions against discrimination generally.[80] There is increasing awareness of the responsibilities that government agencies have to take action to support

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76 Japan provides an example of a particularly strong community and school based approach. *See* National Tax Agency, above n. 70.

77 For example, *see* the discussion in A. Halkyard, 'Treating Taxpayers Right: Taxpayers' Rights with Special Reference to Hong Kong' (2001) 9 *Asia Pacific Law Review*, 133, p. 143.

78 CIAT, above n. 11, p. 7. *See further*, the comprehensive discussion by N. Brooks, 'Key Issues in Income Tax: Challenges of Tax Administration and Compliance', paper presented at the Asian Development Bank 2001 Tax Conference.

79 Above, n. 65.

80 For example, the International Covenant on Civil and Political Rights, art. 26; and European Convention on Human Rights, Art. 14, discussed in C. Ovey and R.C.A. White, above n. 37, p. 412 *et seq*.

non-discrimination. This can be seen in public service legislation, public service charters and in the business or other plans of revenue authorities.[81]

Taxpayers' charters usually include some statement that taxpayers have the right to be informed, assisted and heard.[82] However, a right to assistance should be articulated as a basic principle and in connection with those taxpayers requiring special or particular assistance. The benefit is as much to the revenue authority as it is to the taxpayer. Overtly making assistance available to those who need it acts both as an education process and assists to bring within the tax system those marginalised members of the community who are most likely otherwise to fall within the black economy.[83]

Obviously, the breadth and depth of assistance required will directly affect a jurisdiction's ability to budget for it. However, this does not warrant making the principle only a recommended right. All jurisdictions should do what they can for those taxpayers needing special assistance. The level of assistance will simply vary depending upon budgetary and other resource constraints. It is important, however, that the principle of assisting all taxpayers is expressly articulated as fundamental to any tax administration.[84]

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[81] For example, in Australia, which has no national charter of rights and is not subject to a treaty such as the European Convention on Human Rights, the Constitution, various discrimination acts, the Human Rights and Equal Opportunities Commission and Public Service Act 1999 (Cth) are but a few of the statutes and bodies that place obligations on the ATO to deliver taxpayer assistance in a non-discriminatory manner: M. McLennan, above n. 68, p. 38. *See* in the US, N.E. Olsen, 'Taxpayer Rights, Customer Service and Compliance: A Three-Legged Stool' (2003) 51 *Kansas Law Review*, 1239.

[82] For example, *see* OECD Taxpayers' rights and obligations, above n. 74 and GAP002, above n. 23, p. 3.

[83] K.M. Bloomquist, 'An Overview of some Recent IRS Research on Taxpayer Compliance Behaviour', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006); X.S. Li, 'Ethnic Diversity, Social Identities and Tax Compliance — Evidence from the European and World Values Surveys', seminar paper presented at the University of Michigan (1 November 2005), <www-personal.umich.edu~xinl>, 1 October 2006; and R.M. Bird, J. Martinez-Vazquez and B. Torgler, 'Tax Performance in Developing Countries: The Role of Demand Factors' in National Tax Association, *Proceedings: Ninety-Sixth Annual Conference 2004* (Washington DC, National Tax Association, 2005), p. 284.

[84] *See* A. Halkyard, above n. 77, p. 146 on the Hong Kong Taxpayers' Charter.

F. The principles of acting ethically and professionally

Underlying much of the discussion in previous chapters has been the implicit understanding that taxpayers can rely on revenue authorities to act ethically and professionally. It is arguable, given the extent of the requirements in the Model to adopt principles of good governance and good practice, and to ensure the independence, fairness and impartiality of the revenue authority, that there is no need to articulate ethics and professionalism as a separate principle. There are several reasons why it is appropriate.

First, the extent and effect of corruption in governments and revenue authorities around the world[85] suggests that it is essential for taxpayers to have a general principle that they can rely on in bringing a complaint through the revenue authority dispute resolution mechanism and, ultimately, a revenue ombudsman. Rarely would a revenue authority refuse to say that its officers act ethically and professionally. It is far more likely that a government would not introduce principles of good governance and comply with the International Monetary Fund *Code of Good Practices on Fiscal Transparency*. At least a statement of general principle gives some ground for administrative protection.

Second, although there are usually laws, both criminal and administrative, which require ethical and impartial behaviour, they are normally fairly specific because there are penalties associated with them.[86] They do not necessarily cover the less obvious areas of unethical conduct, where there may be a minor conflict of interest, a slightly dubious decision, or an unprofessional attitude that is affecting the proper determination of a taxpayer's liabilities. A general principle would do so.

Third, the nature of a principle of tax administration makes it a useful protection both for the taxpayer and the reputation of the revenue authority.[87] Although it could be used both as a ground for judicial review and a basis for administrative complaint, it still has force even where it is only a basis for administrative complaint. It ensures that there is ground for complaint using

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85 G. Turley, above n. 16; S.S. Everhart, J. Martinez-Vazquez and R.M. McNab, 'Corruption, Investment and Growth in Developing Countries' in National Tax Association, above n. 45; and *see* the discussion in Chapter 7 on this point.

86 For example, in Australia: the Public Service Act 1999 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth), the various discrimination acts and the Crimes Act 1922 (Cth) to name but a few.

87 M. McLennan, above n. 68, p. 34. Japan strongly emphasises this approach: National Tax Agency, above n. 70, p. 3 *et seq*.

the internal revenue authority dispute resolution mechanisms. It also allows escalation to the independent office of a revenue ombudsman.

The principles of ethical behaviour and professionalism are encapsulated in some form in most taxpayer's charters. It makes sense to reflect this in the Model. For those jurisdictions where it is not clear that they can be relied on by taxpayers using existing remedies, they are a useful additional protection. For those jurisdictions that do adhere to the principles as part of the general requirement of civil servants, stating them clearly as part of the rules governing the tax administration gives added weight to their content in a tax context. Professional behaviour includes the subsidiary concept that revenue officers will not draw an adverse inference simply because a taxpayer chooses to exercise available legal or administrative rights.

III. Information gathering, audit and investigation[88]

It was noted in Chapter 2 that the Model does not include taxpayer obligations. It provides guidance on best practice to policy makers; setting out the rights that the rules governing the tax system should include. However, those rights are firmly rooted in taxpayer obligations. Nowhere is this more important to understand than in the context of information gathering, audit and investigation. Taxpayers' rights must provide an appropriate safety net for taxpayers without undermining the purpose and effectiveness of the tax system.

Taxpayers' rights have been used in the past as a stick with which to beat revenue authorities. Greenbaum argued that the US Taxpayer Bills of Rights 2 and 3 were simply vehicles used for political purposes to undermine and reduce the powers of the IRS.[89] He suggested that:[90]

> There is a serious problem associated with undermining the IRS unnecessarily or excessively. The concern is that the IRS would no longer be perceived as a credible or effective tax administration and widespread voluntary compliance with the law would cease.

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[88] For a wide range of country specific examples, *see* D. Bentley, above n. 7. For a general survey of the application of these obligations, *see* OECD Taxpayers' rights and obligations, above n. 74 and OECD, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2006)* (Paris, Centre for Tax Policy and Administration, 2006) ('2006 OECD Comparative Survey').

[89] A. Greenbaum, 'United States Taxpayer Bills of Rights 1, 2 and 3: A Path to the Future or Old Whine in New Bottles', in D. Bentley, above n. 7, p. 347, p. 377.

[90] Ibid., p. 378.

Particularly in an environment of increasing self-assessment, comprehensive powers are critical to a revenue authority's effective operation: most importantly to gather information, audit taxpayers and enforce the payment of taxes that are legally due and payable. Much of the analysis in this book so far has focused on the importance of the relationship between taxpayers and revenue authorities. This is appropriate as it is the engine room of voluntary compliance.[91] However, there are several themes in modern tax administration that require a relatively powerful steel fist within the velvet glove of improved relationships. The following paragraphs identify some of the more important of these themes.

First, self-assessment has become the preferred form of assessment of taxpayers over administrative assessment procedures because it is seen as more effective and more efficient.[92] Where administrative assessment is used, it is largely automated.[93] The result is a focus by revenue authorities on a risk-based and targeted verification process designed to identify the most significant instances of non-compliance.[94] These are dealt with using a range of methods designed to encourage voluntary compliance, but designed also to penalise those who abuse the system; in particular those engaged in fraud and evasion.[95] It is critical to maintain the balance between encouragement and deterrent to make the tax administration as effective as possible.[96]

Second, there is a strong trend in revenue authorities towards performance-oriented budgeting and performance management as governments and citizens demand value for money (efficiency and effectiveness) from their revenue authority.[97] OECD revenue authorities are arguably reasonably

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91 K. Messere, F. de Kam and C. Heady, *Tax Policy: Theory and Practice in OECD Countries* (Oxford, OUP, 2003) p. 31.

92 2006 OECD Comparative Survey, above n. 88, p. 57.

93 Ibid.

94 Ibid. Most revenue authority websites publish the annual compliance program, which identifies the most pressing compliance issues.

95 For example, ATO, *Compliance Program 2006-07*, <www.ato.gov.au>, 1 November 2006.

96 N. Brooks, above n. 78, and J.G. McCubbin, 'Optimal Tax Enforcement: A Review of the Literature and Practical Implications' in National Tax Association, above n. 45, p. 16.

97 2006 OECD Comparative Survey, above n. 88, p. 36; and *see*, for an example from the developing Pacific Island Countries, C. Grandcolas, 'Management of the VAT — Improving the Level of Compliance Using Performance Indicators' (2006) 12 *Asia-Pacific Tax Bulletin*, 6.

well resourced.[98] Non-OECD countries are usually not.[99] The emphasis on outcomes inevitably means that there is a welcome trend towards ensuring that there is efficient use of the resources that are available. This loops back again to the importance of tax audit activities and verification and related functions.[100]

Third, the advent of electronic commerce has been identified for some time as a threat to revenue.[101] Revenue authorities have responded both individually: through domestic measures; and also multilaterally: for example, by amending relevant articles and commentary in the OECD Model Tax Convention on Income and on Capital, designed to flow through to individual double tax agreements. However, electronic commerce transactions remain as a significant compliance risk requiring strong measures to combat avoidance and evasion.

Fourth, globalisation has a number of ramifications for revenue collection. Harmful tax competition and the problems associated with bank secrecy relating to accounts held by non-residents of the host jurisdiction have attracted significant revenue activity.[102] The ATO *Compliance Programme 2006-07*, which is illustrative of the issues facing most mature economies, also identifies as problems activities such as: profit shifting, international consumption tax schemes, cross-border financing, and compliance issues associated with individual mobility.[103] Tanzi has written extensively for many years from an IMF perspective about these challenges to the revenue authorities; he adds to the list the taxation of derivatives and hedge funds and the inability to tax financial capital.[104] As soon as taxpayers entering into these activities

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98 2006 OECD Comparative Survey, above n. 88, p. 100 *et seq*.

99 Ibid., T.A. Khan, 'Pakistan: Income Tax Reforms' (2006) 12 *Asia-Pacific Tax Bulletin*, 42; and *see* G. Turley, above n. 16, who examines the problem of revenue erosion in a number of countries in transition.

100 2006 OECD Comparative Survey, above n. 88, p. 105 and N. Brooks, above n. 25, p. 33.

101 OECD Committee on Fiscal Affairs, *Electronic Commerce: A Discussion Paper on Taxation Issues* (Paris, OECD, 1998).

102 *See*, *e.g.*, OECD, Harmful Tax Competition: An Emerging Global Issue (Paris, OECD, 1998) and subsequent reports, discussed in Chapter 2.

103 Above n. 95. *See further*, the Final Seoul Declaration, following the Third Meeting of the OECD Forum on Tax Administration (14-15 September 2006), <www.oecd.org>, 1 November 2006.

104 V. Tanzi, 'The Economic Role of the State in the 21st Century' (2005) 25(3) *Cato Journal*, 617, 633 and 'Globalization, Technological Developments and the Work of Fiscal Termites' (2001) 26(4) *Brooklyn Journal of International Law*, 1261.

move beyond acceptable tax planning, these issues have nothing to do with lapses in voluntary compliance and everything to do with intentional avoidance and evasion of taxes. It is essential that revenue authorities have the tools to counter serious risks to revenue of this kind.

Fifth, aggressive tax planning, defined by Braithwaite as 'a scheme or arrangement put in place with the dominant purpose of avoiding tax',[105] is widely recognized as a growing risk to revenue in countries around the world.[106] At its extremes it blurs into evasion of taxes and fraud. The latter remain significant threats to the revenue, particularly in the context of corruption, organized crime and money laundering activities.[107]

Realistically, revenue authorities are often at a disadvantage in combating systematic and intentional tax evasion by powerful taxpayers. This is reflected in works by international experts with titles such as *The Crisis in Tax Administration*.[108] Tillinghurst notes:[109]

> The number of challenges facing the Internal Revenue Service in administering and enforcing compliance with the international provisions of the U.S. tax law is indeed prodigious . . . Criminal types are not, of course, cooperative, nonreporters are hard to find, and the multinationals, even when compliant or relatively so, present a daunting range of issues of both legal and factual complexity.

It is particularly so in non-OECD countries where limited resources and a relatively immature infrastructure compounds weaknesses in enforcement

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105 J. Braithwaite, *Markets in Vice Markets in Virtue* (Oxford, OUP, 2005), p. 16.

106 J. Braithwaite, ibid, describes the recurring cycles of aggressive tax planning in the US and Australia. This is reflected in the ATO, *Compliance Program 2006-07*, above n. 95 which includes the topic as one of its major issues.

107 In some countries these issues threaten the viability of the tax system. *See e.g.*, G. Turley, above n. 16.

108 H.J. Aaron and J. Slemrod (eds.), *The Crisis in Tax Administration* (Washington D.C., Brookings Institution Press, 2004). The difficulties of creating effective tax administration in countries in transition is described, *e.g.*, in G. Turley, above n. 16 and V. Tanzi, 'Creating Effective Tax Administrations: The Experience of Russia and Georgia' in J. Kornai, S. Haggard and R. Kaufman (eds.), *Reforming the State: Fiscal and Welfare Reform in Postsocialist Countries* (Cambridge, CUP, 2001).

109 D.R. Tillinghast, 'Issues of International Tax Enforcement', in H.J. Aaron and J. Slemrod, ibid., p. 38. *See generally*, J. Braithwaite, above n. 105, and R. Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113 *Harvard Law Review*, 1573.

programmes.[110] The aim of taxpayers' rights therefore should not be to undermine a revenue authority's duty and ability to collect the tax that is legally due under the laws of the jurisdiction in which it operates. Braithwaite notes that in the 21st century, the measures required to ensure compliance will continue to include: responsive regulation, escalating enforcement to counter increasingly egregious breaches of the law, and adequate and escalating penalties to act as a serious deterrent.[111]

Taxpayers' rights provide a safety net to ensure that a tax system operates according to accepted rules of procedural fairness and provides adequate opportunity for taxpayers to seek review. Taxpayers' rights provide a legal and moral basis for the proper operation of the tax system. They rest not simply on the laws of a particular jurisdiction, but also on generally accepted norms of international law and practice. Within these parameters, it is appropriate to assume that taxpayers should be expected to act honestly and themselves comply both with the rules of the jurisdictions in which they live and those in which they choose to operate or simply enter into transactions.

A direct result of this assumption is that in the increasingly difficult environment for collecting taxes, the revenue authority has the right to complete information that it requires to assess the tax liabilities of each taxpayer. It is essential that there is appropriate protection in place to prevent misuse of that information. However, by giving the revenue authority complete information the taxpayer demonstrates the good faith that then allows the operation of a wide range of protective rights in relation to the way that information is used. The same rights simply cannot be afforded to taxpayers who refuse to provide complete information.

It comes back full circle to the rule of law. Where a taxpayer submits to the rule of law in a jurisdiction, that taxpayer is given the full protection of the law and a wide range of non-legal rights associated with voluntary compliance. Where a taxpayer intentionally steps into the gloomier shadows of legal uncertainty, the protective rights afforded to the taxpayer become more restricted. Where the taxpayer intentionally breaks the law, the rights are limited to legal rules of procedural fairness in criminal proceedings. The description of best practice in tax administration set out in this section does not therefore extend taxpayers' rights beyond what is reasonable in the current compliance environment. It rather seeks to maintain an appropriate balance between taxpayers' rights and the legal obligation of the revenue authority to collect taxes due.[112]

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110 N. Brooks, above n. 25 and n. 68 and G. Turley, above n.16.

111 J. Braithwaite, above n. 105, p. 177 *et seq*.

112 J.G. McCubbin, above n. 96.

It mirrors the requirements of transparency and accountability demanded of the revenue authorities themselves, which are fundamental to principles of good governance and good practice.

A. General information gathering

Revenue authorities rely on information to assess a taxpayer's liability to pay tax under the law and/or to verify taxpayer self assessment. The primary legal rights in Chapter 6 govern the requirements for the imposition of a tax liability. Secondary legal rules normally govern the procedures for the practical administration of the tax system. These will cover such matters as: who must file a return or other document; who has the authority to demand a return, an additional return or another document; the information that must be included in a return or other document; and the timing for lodgement of a return or other document. Primary legal rights cover matters that might impact on the proper operation of the rule of law, such as the general requirement that laws should not operate retroactively and that the rules governing the provision of information must be published and available to taxpayers so that they can comply with the law.

The general rights to privacy in a jurisdiction cover such issues as national identification numbers and their broader use by government. Such arguments are often caught up in the debate over taxpayers' rights,[113] but taxpayers' rights are limited to ensuring the confidentiality of information provided for tax purposes. It is the application of the general rights of citizens that provide limitations on how a jurisdiction may choose to identify or register its citizens. Most revenue authorities now use unique taxpayer identifiers or another high integrity number for both personal and business taxation.[114]

There are four general areas of importance that relate to information gathering:

1. secrecy or confidentiality provisions governing information gathered;
2. gathering information from taxpayers;
3. gathering information from third parties; and
4. exchange of information with other revenue authorities.

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[113] This has been a particular issue in Japan. *See* K. Ishimura, 'The State of Taxpayers' Rights in Japan' in D. Bentley, above n. 7, p. 227, p. 256.

[114] 2006 OECD Comparative Survey, above n. 88, p. 121.

They are dealt with in order. As noted above, the general assumption is that it is legitimate for a revenue authority to require the provision of information by its citizens. The rights considered here are those that are concerned with how the information is obtained and how it is dealt with once it has been obtained.

1. Secrecy or confidentiality provisions

The gathering of information from taxpayers is predicated upon the revenue authorities treating the information as confidential.[115] Most jurisdictions have general privacy laws, but tax laws involve the provision of some of the taxpayer's most detailed and intimate information. It is therefore in the public interest that there should be additional specific and stringent safeguards governing information provided for tax purposes.[116] They should set out precisely how, when and where information relating to a taxpayer can be used.

The rules should govern the collection, storage, security, access to, correction of, use and disclosure of information provided.[117] They should note, in particular, the importance of a revenue officer using the information only in the course of her or his duties. The rules should extend to third parties working for the revenue authority and given access as a result to confidential taxpayer information.[118]

There should be restrictions on revenue officers making records of information or divulging or communicating information about anyone's tax affairs.[119] The restrictions should continue to apply after they cease employment as a revenue officer. Within the revenue authority these activities should be restricted to the course of normal duties as they affect that taxpayer's tax affairs. That might extend to divulging information about one taxpayer to

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115 OECD Taxpayers' rights and obligations, above n. 74, para. 2.26 and OECD, GAP002, above n. 23, p. 9.

116 For example, Australia Income Tax Assessment Act 1936 (Cth) s. 16, and Crimes Act 1914 (Cth) s. 70. *See* further, Australian Law Reform Commission, *Protecting Classified and Security Sensitive Information: Discussion Paper 67* (Canberra, Commonwealth of Australia 2004), p. 113 *et seq*. Canada has extensive security arrangements in place, particularly to protect electronic data: <www.cra-arc.gc.ca>, 1 November 2006.

117 OECD Taxpayers' Rights and Obligations, above n. 74, para. 2.28.

118 For example, K. Wheelwright, 'Taxpayers' Rights in Australia' in D. Bentley, above n. 7, p. 57, p. 74 and M. McLennan, above n. 68, p. 43.

119 CIAT, 'Minimum necessary attributes for a sound and effective tax administration', above n. 11, p. 7.

another where the basis of assessment of the other taxpayer depends upon that information. In common law jurisdictions this can occur, for example, with trust distributions where details of the trust distribution notified to the revenue authority by a trust may be disclosed to the taxpayer to whom the distribution was made.

Sometimes information is passed to other government departments as revenue authorities take on roles wider than tax collection.[120] The same rules should apply to officers of other departments in respect of confidential tax related information. Passing information outside the revenue authority or to an approved government department should normally only occur in connection with tax recovery proceedings or to other revenue authorities in connection with treaty provisions (discussed below). Section 241 of the Canadian Income Tax Act permits disclosure, for example, where there are:[121]

- criminal proceedings;
- legal proceedings that relate to the enforcement of the tax law;
- imminent danger of death or physical injury to any individual; and
- intra-governmental or inter-governmental transfer of specified information.

The rules should be particularly clear on levels of authorization and the reasons required before confidential information is released. This might extend to disclosure of the names of taxpayers with significant outstanding tax debts as a form of penalty, as occurs in Hungary.[122]

Taxpayers should have reasonable right of access to information held about them by the revenue authorities, provided it does not unduly hinder the administration of the tax system.[123] This is normally available in a jurisdiction under freedom of information or similar provisions. It extends to requests to amend or annotate details about them that are incorrect. Restrictions on access usually include access to documents with references to third parties, internal working documents or where such access is against the public interest.[124]

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120 2006 OECD Comparative Survey, above n. 88, p. 14 and OECD Taxpayers' Rights and Obligations, above n. 74, para. 2.27.

121 Discussed in J. Li, 'Taxpayers' Rights in Canada' in D. Bentley, above n. 7, p. 89, p. 96. *See* the similar German provisions in C. Daiber, above n. 7, p. 171.

122 Discussed in D. Deak, 'Taxpayer Rights and Obligations: The Hungarian Experience' in D. Bentley, above n. 7, p. 200, p. 212.

123 M. McLennan, above n. 68, p. 44.

124 Freedom of Information Act 1982 (Cth) Part IV, and *see* M. McLennan, ibid.

In most revenue authorities there are regular checks to ensure that the confidentiality provisions are not being breached. Normally, breaches of the provisions by a revenue officer would constitute a breach of her or his employment contract and a criminal offence.[125] The sanctions should allow both dismissal from the revenue authority and criminal penalties ranging from fines to imprisonment, depending upon the seriousness of the offence. Criminal sanction is justified in this instance as it is in the public interest.[126] Where a taxpayer can demonstrate damage or loss as a result of a revenue officer breaching confidentiality provisions, compensation should be payable.

In certain circumstances taxpayer information that does not directly or indirectly reveal the identity of the taxpayer to whom it relates may be released.[127] This commonly occurs with redacted information contained in ruling requests. It is of particular concern in relation to transfer pricing arrangements and advance pricing agreements, where taxpayers provide sensitive competitive information to revenue authorities.[128] It has been the subject of debate, particularly in countries such as the US and Australia.[129] Care has been taken in both jurisdictions to protect the confidentiality of information provided using appropriate legal mechanisms. Further issues arise in relation to information exchange (discussed below).

Advances in technology mean that tax authorities need to place particular emphasis on the protection of confidential information held on databases.[130] The protection should extend to provide strong sanctions to deter unauthorized third parties from accessing confidential taxpayer information. No system is completely safe from computer hackers and there must be protection for taxpayers against unauthorized dissemination of information possibly critical to the commercial survival of those taxpayers. Where third party providers are used in data collection, management or storage, they should fall within the confidentiality provisions governing taxpayer information applicable to revenue officers. It is important that individuals are personally liable for

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125 OECD Taxpayers' rights and obligations, above n. 71, para. 2.26.

126 Australian Law Reform Commission, above n. 116, p. 129.

127 For example, the Canadian Income Tax Act (RSC 1985 (5th Supp.) c. 1), s. 241.

128 OECD, above n. 74, para. 2.29.

129 *See* M. Markham, above n. 39, p. 280 *et seq*.

130 OECD Taxpayers' rights and obligations, above n. 74, p. 20. For example, this is governed in part in Switzerland by, Ordinance of the FDF on Electronically Transmitted Data and Information (30 January 2002), <www.estv.admin.ch>, 1 November 2006.

unauthorized release of taxpayer information. The companies or organisations that they work for should also bear concurrent liability.

2. Gathering information from taxpayers

Tax authorities require information to assess a taxpayer's liability to tax. This usually requires the return of information of some kind. The 2006 OECD Comparative Survey noted that the four main types of personal income tax arrangements for employee taxpayers include a largely return-free alternative for taxpayers with only one or limited sources of income, which is used in a number of countries.[131] In such cases, employees provide information on entitlements to their employers, who then calculate the applicable tax rate so that the correct amount of tax is paid through the withholding system. Filing a return is therefore the norm for taxpayers in all but a few jurisdictions. The return and any subsequent investigation can result in the provision of substantial information to the revenue authorities covering every aspect of a person's or business' activities.

Due process demands that taxpayers should be aware of the requirement to provide information, that they should have the capacity to provide the information, and that there should be a presumption that they are acting honestly unless they act otherwise. This is covered under the requirements for certainty, publication and the principles of good practice discussed in Chapters 6 and 7. Under the basic right to privacy there should be limits on the scope of the tax authorities' information gathering powers. This is normally phrased as a requirement that information collected relates to the financial affairs of the taxpayer. Related information extends to information that impacts upon the tax affairs of the taxpayer. For example, provision of a tax rebate may depend upon the detailed personal circumstances of the taxpayer. Determination of residence for tax purposes can involve a detailed examination of a taxpayer's private life.[132] The privacy laws of each jurisdiction should identify how the laws apply to the revenue authorities. These will be governed, for signatories, by Article 17 of the International Covenant on Civil and Political Rights.

Collection of tax does not require the provision of unlimited information; in most cases revenue authorities want only relevant information so that they

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131 2006 OECD Comparative Survey, above n. 88, p. 59 and the Table on p. 69.

132 R. Rohatgi, *Basic International Taxation* (The Hague, Kluwer Law International, 2002), p. 132 provides a range of examples of country practice.

can operate more efficiently. What is the best way to protect a taxpayer against abuse of information gathering powers where, for example, a taxpayer is targeted by a rogue officer who keeps on demanding unnecessary information? It is essentially a management issue. Authorization for significant information demands should be given by a senior officer. Therefore it is best dealt with through the application of the principles of good practice combined with an effective internal dispute resolution process. There is the further option of referral to an ombudsman if the issue is not resolved. As with most rights included in this chapter, there is an assumption that the basic organs of state are operating more or less effectively.

3. Gathering information from third parties

Tax administration depends increasingly upon reporting and withholding by a wide range of third parties.[133] The OECD notes that there are two pre-conditions for effective and efficient use of information reporting and matching: the reporting body must be able to capture and send reports electronically; and the reporting body must use a high integrity taxpayer identifier to enable the revenue authority to match the information.[134] As revenue authorities are able to meet these pre-conditions, this kind of reporting will increase to improve audit efficiency. Meanwhile, there is still significant capture of confidential data from third parties, even if it cannot all be used.

Taxpayer's rights do not cover the holding of information by third parties. That is covered by the privacy laws of the relevant jurisdiction. They do cover the request for information and the treatment of the information once it is provided. The latter point is covered by the confidentiality provisions discussed above.

The requirement to provide information to a revenue authority about a taxpayer should be governed by legislation. The right to privacy is recognized as a fundamental right under Article 17 of the International Covenant on Civil and Political Rights. Article 17 provides that no-one should be subjected to arbitrary or unlawful interference. This requirement is normally translated into the privacy laws of a jurisdiction. The result is that both the revenue authority and the third party provider are protected where the requirement to provide information is legislated.

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[133] 2006 OECD Comparative Survey, above n. 88, p. 59 and the Table on p. 63 *et seq*.

[134] Ibid, p. 60.

For the standard reporting function there should be no requirement that the taxpayer is notified before a report is made. It would be impossible anyway in many instances of automated reporting, where lists of transactions are transmitted. The revenue authority should, as part of its compliance programme, publish the wide range of information that it is entitled to collect. It should also explain how the information is used and the procedures it follows to keep that information confidential. Many revenue authorities do this as a matter of course. It falls within the principles of good practice.

Where additional information is sought from a third party as part of an investigation or audit, the circumstances are different. Before a revenue authority exercises its powers of search and/or seizure (discussed below), it may wish to gather further information from a wide range of sources. Again, the power to make such requests should be legislated, even if it is part of a general power of administration.

Should the taxpayer be notified before an order to produce such information is made to a third party? There is a danger that notifying a taxpayer might result in the taxpayer obstructing the investigation. However, taxpayers would be concerned that a request for information outside the automatic reporting requirement immediately tells the third party that they are under investigation. This could negatively impact on a taxpayer; for example, where a bank delays or refuses a loan request because the bank is made aware that the taxpayer's tax liability is under investigation. In the US, the rationale for requiring notification of a taxpayer is to give the taxpayer the opportunity to provide the information before an approach is made to a third party.[135]

The US approach does not appear to be common.[136] However, it could be listed as a recommended right. Even then it may be too stringent for general adoption and should be ameliorated by the requirement that notification need not be given if the revenue officer has reasonable grounds to suspect that prior notification would result in the taxpayer obstructing the investigation.[137] The reasonable grounds should be written and approved by a senior officer in the revenue authority. This additional step then provides support for the revenue officer in the event of a subsequent investigation by the ombudsman.

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[135] (c)(1) prohibits the IRS from contacting any person other than the taxpayer without giving the taxpayer reasonable notice prior to the contact.

[136] 2006 OECD Comparative Survey, above n. 88, p. 88 and OECD, above n. 74, p. 16 and Table 7, p. 44 *et seq*.

[137] D. Williams, 'United Kingdom Tax Collection: Rights of and against Taxpayers' in D. Bentley, above n. 7, p. 331, p. 339.

Certain third parties are exempt from providing information on request and this is considered below under privilege. Where a third party wilfully provides fraudulent information about a taxpayer this should constitute an offence and the taxpayer should be able to bring a civil action for damages or compensation.[138]

4. Exchange of information with other revenue authorities

Globalisation has resulted in previously unprecedented flows of capital across borders and transformation of economies.[139] Concomitant with these changes has been the increasing pressure on national revenue authorities to maintain their tax base and ensure tax compliance. It is reflected in the wide range of co-operative activities that revenue authorities now undertake. Among these, information exchange is seen as particularly important. Whereas previously it was used as a means to ensure that double tax agreements were properly applied, it is increasingly now found as an important component of a well-managed domestic compliance programme.[140]

The legal basis for the exchange of information is usually found in a mix of domestic legislation and bilateral and multilateral conventions and agreements. The OECD *Manual on the Implementation of Information Provisions for Tax Purposes* ('OECD Manual') provides an extensive list of international legal instruments used as a basis for information exchange.[141] Probably the three most well used models are Article 26 of the OECD Model Convention on Income and on Capital ('OECD Model'), the 2002 OECD Model Agreement on Exchange of Information on Tax Matters ('OECD Agreement') and the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters ('Council of Europe/OECD Convention').[142] Information

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138 For example, *see* Internal Revenue Code § 7434(a). Discussed in A. Greenbaum, above n. 89, p. 364.

139 For a colourful description of the transformation, *see* D. Yergin and J. Stanislaw, *The Commanding Heights* (New York, Touchstone, 2002).

140 *See e.g.*, ATO, *Compliance Program 2006-07*, above n. 95 and OECD, *Manual on the Implementation of Information Provisions for Tax Purposes: Module on General and Legal Aspects of Exchange of Information* (Paris, OECD, 2006), p. 4, <www.oecd.org>, 1 November 2006 ('OECD Manual').

141 OECD Manual, ibid, p. 5.

142 All three are available at <www.oecd.org>, 1 November 2006 and the Council of Europe/OECD Convention and its Explanatory Report, <conventions.coe.int>,

exchange is highly sophisticated in Europe, particularly, for example, the Nordic Assistance Convention, the EC Directive on Mutual Assistance and Council Regulation 1798/2003 on the administration of the laws on VAT.[143]

The Explanatory Report to the Council of Europe/OECD Convention, in common with most such instruments, identifies as its object, 'to promote international co-operation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers'.[144] It goes on to say that 'The Convention specifically ensures that taxpayers' rights under national laws are fully safeguarded'.[145] Given that these instruments have significant international agreement, they are the appropriate guides to best practice in taxpayer protection in matters concerning the exchange of information.

The OECD Manual identifies the main forms of information exchange that take place and these can be summarised as:[146]

- exchange of information on request between jurisdictions;
- automatic exchange of information, usually in standard format: typically used for routine transfer of information comprised of multiple individual cases of the same type, such as dividends, royalties, interest, pensions etc.;
- spontaneous exchange of information, where a party obtains information in the course of administering its own tax laws, which it believes will be of interest to a treaty partner, and passes it on without any request;
- exchange of information obtained under a simultaneous examination by two or more jurisdictions, each on its own territory, of one or more taxpayers in which they have a common interest;
- exchange of information during an authorized visit by foreign revenue authority officers to gather information in the host jurisdiction, often through participation in a tax examination; and

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1 November 2006. For a useful early survey and discussion, *see* Committee on Fiscal Affairs, *Tax Information Exchange Between OECD Countries: A Survey of Current Practices* (Paris, OECD, 1994).

143 Directive 77/799 EEC as updated on Direct Taxation as updated. For a comprehensive discussion of information exchange in the European Union, *see* L.W. Gormley, *EU Taxation Law* (Richmond, Richmond, 2005), p. 15 *et seq.*

144 Council of Europe/OECD Convention Explanatory Report, above n. 142, para. 1.

145 Ibid., para. 7.

146 OECD Manual, above n. 140, para. 18-19.

– exchange of information on an industry-wide level to obtain a broader view of that industry or economic sector as a whole.

Different jurisdictions take different approaches to exchange of information. It is therefore useful for the Model to take an approach based on general principles. These can then be adapted to the context of each jurisdiction, the wider framework of rules in which information exchange is based, and the particular types of information exchange in which the jurisdiction is engaged.

a. Authorization

Information exchange should be approved at the most senior levels within the revenue authority.[147] Treaty obligations may require a senior official in the Ministry of Finance or Foreign Affairs to be designated as the competent authority to sign off on the exchange of information. This does not mean that every exchange of any information requires approval. Obviously automatic and some forms of spontaneous information exchange require direct contact between revenue officers at many levels of the revenue authority. In cases of automatic exchange, initial authorization will govern a substantial quantum of information exchange over a long period, subject only to regular audit and review. In others authorization is required on each request. What is important is that there are clear procedures and guidelines for all exchanges of information once the type of information exchange has been approved at the highest level. The procedures should ensure that revenue officers automatically escalate matters of particular sensitivity or importance and that the characteristics of such matters are clearly set out in the guidelines so that they are easily recognisable by field officers.

b. Scope

Exchange of information is for clearly designated purposes. Although it is intended in most agreements that they should incorporate a very wide range of information, it is not intended that there should be 'speculative requests for information that have no apparent nexus to an open inquiry or investigation'.[148] This is not applicable to industry-wide information exchange,

147 Ibid., p. 8.
148 Ibid., p. 9.

where such arrangements allow revenue authorities to identify trends and other factors that will enhance its general compliance programme. The term, 'foreseeable relevance' is commonly used.[149] In making a request for information, a requesting jurisdiction should provide sufficient relevant information to allow the requested jurisdiction to make a decision on the relevance of the request.

c. Guidelines and procedures

The OECD Manual provides a number of checklists of information that should be used by each party to an information exchange; for example, *Module 1 on Exchange of Information on Request* ('OECD Manual: Module 1') sets out the information that requesting parties should include with any request for the exchange of information.[150] The advantage of the guidelines and checklists set out in the Manual is that they ensure procedural protection of taxpayers' rights in accordance with accepted practice under the majority of international agreements. Although the protection of taxpayers' rights is intended under information exchange agreements, how the protection works during the process of exchange is not always spelt out. It is therefore appropriate for best practice if revenue authorities ensure that they either adopt the OECD Manual or develop their own guidelines that provide equivalent procedures to ensure taxpayer protection. There should be regular audit and review of the application of procedures and guidelines to ensure proper compliance.

d. Equivalent protection to the home state

Article 21 of the Council of Europe/OECD Convention sets out what is meant by the requirement that nothing in an agreement or convention should 'affect the rights and safeguards secured to persons by the laws or administrative practice of the requested state'. The principle of reciprocity in this connection is fundamental to the protection of taxpayers' rights. The principle and its interpretation in Article 21 can be said to represent accepted international best practice and should therefore be included in the Model.

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149 Used in the OECD Model, Art. 26; the OECD Agreement, art. 1; and the Council of Europe/OECD Convention, Art. 4, above n. 142.

150 OECD Manual: Module 1, above n. 140, p. 3.

Article 21(2) is set out below with the provisions and a paraphrased meaning in italics taken from the Explanatory Report providing 'Commentary on the Provisions of the Convention'.[151]

> 2 Except in the case of Article 14 (*which allows that time limits remain those of the requesting state*), the provisions of this Convention shall not be construed so as to impose on the requested state the obligation:
>
> a. to carry out measures at variance with its own laws or administrative practice or the laws or administrative practice of the applicant state;
>
> (*This restricts the agreement to powers and practices that the parties have in common and prevents a state from using indirectly, greater powers in another jurisdiction than it possesses under its own law.*)
>
> b. to carry out measures which it considers contrary to public policy (order public) or to its essential interests;
>
> (*States will not jeopardise their own public policy or essential interests, including public security and economic interests, to provide assistance to another state.*)
>
> c. to supply information which is not obtainable under its own laws or its administrative practice or under the laws of the applicant state or its administrative practice;
>
> (*This restricts the supply of information to that obtainable by a state under its own laws and administration and reinforces safeguards such as protection of secrecy, legal professional privilege or similar privilege, bank secrecy and other procedural rights and safeguards. For example, it restricts a state from undertaking a special investigation that it would not undertake for its own purposes to obtain the information.*)
>
> d. to supply information which would disclose any trade, business, industrial, commercial or professional secret, or trade process, or information the disclosure of which would be contrary to public policy (order public) or to its essential interests;
>
> (*Discussed below.*)
>
> e. to provide administrative assistance if and insofar as it considers the taxation in the applicant state to be contrary to generally accepted taxation principles or to the provisions of a convention

[151] Council of Europe/OECD Convention, above n. 142.

> for the avoidance of double taxation, or of any other convention which the requested state has concluded with the applicant state;
>
> (*This exclusion protects taxpayers in the event that the requested state considers, for example, that the applicable tax laws in the other state are confiscatory or that the punishment for a tax offence would be excessive.*)
>
> f. to provide assistance if the application of this Convention would lead to discrimination between a national of the requested state and nationals of the applicant state in the same circumstances.
>
> (*This provides protection against discrimination and applies to matters of both substance and procedure.*)

e. Confidentiality of information

Although Article 21(2) covers the matter of secrecy, it is a controversial area and deserves further comment. It is covered by Article 22 of the Council of Europe/OECD Convention. Before releasing information to another jurisdiction, a revenue authority must be satisfied that all information relating to a taxpayer will remain confidential, with at least equivalent protection to that enjoyed in the home jurisdiction.[152] This is the basic hurdle that must be overcome before any information exchange can proceed. In addition, disclosure of the information is restricted to:[153]

> persons or authorities (including courts and administrative or supervisory bodies) involved in the assessment, collection or recovery of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, taxes of that Party.

Only these persons or authorities may use the information and then only for the purposes set out.

Secrecy is particularly important for trade, business, industrial, commercial or professional secrets or trade processes.[154] In these cases there is normally no obligation to provide such information under an information request, even where the secrecy provisions in the requesting country are equivalent. Once legal protection is established, the justification for refusal to provide information is largely concerned with politics and trust. Tanzi and Zee give

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152 For example, OECD Agreement, Art. 7, above n. 142.

153 Council of Europe/OECD Convention, art. 22, above n. 142.

154 Ibid.

the example of the unlikelihood of the US and France exchanging information on the activities of Boeing and Airbus.[155] Where the secrecy provisions in the requesting jurisdiction are adequate and it is other reasons that result in a decline to exchange information, it is sufficient protection that the refusal to provide information should be restricted to the secrets themselves. It would not apply to financial or similar information that, although related to the secrets, would reveal nothing about the content of the secret information.[156]

In some jurisdictions, there is a requirement to notify the taxpayer before exchange of information occurs.[157] This is probably not widely accepted enough to make it a recommended right in all instances. However, given the importance of trade, business, industrial, commercial or professional secrets or trade processes, it would be appropriate where there is a request for information that might affect such secrets or processes to notify the taxpayer before the information is given. This would then allow the taxpayer to make application, if desired, as to why the information should not be provided.

Providing notification to the taxpayer in such circumstances would constitute best practice and is consistent with the nature of the protective clauses inserted into exchange of information agreements. It is often only the taxpayer who has the knowledge and expertise to explain why a secret or process is deserving of particular protection. If no reference is made to the taxpayer, the protective clause in an agreement loses some of its effect.

Articles in exchange of information agreements provide for matters that fall outside the purview of the Model. Bank secrecy and similar issues should be dealt with elsewhere in the domestic law.

B. Audit and investigation

1. The audit model

Audit and investigation comprise some of the most controversial exercises of the revenue authorities' powers. This section deals first with

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155 V. Tanzi and H.H. Zee, 'Can Information Exchange be Effective in Taxing Cross-Border Income Flows?' in K. Andersson, P. Melz and C. Silfverberg (eds.), *Liber Amicorum Sven-Olof Lodin* (Stockholm, Kluwer Law International, 2001), p. 259, p. 266.

156 OECD Manual, above n. 140, p. 14.

157 For example, Germany, the UK and the Netherlands have varying degrees of additional protection.

the rights of taxpayers in connection with tax audits, followed by an examination of search and seizure powers. Legal professional privilege and rules against self-incrimination are discussed in the context of search and seizure.

The audit process is an essential tool for managing effective and efficient tax administration, particularly in jurisdictions using self assessment or automated administrative assessment.[158] The focus of the modern audit can be gauged from OECD documents and the published compliance models and approaches of revenue authorities.[159] A twofold aim is: to create an environment that encourages and supports high levels of voluntary compliance by strategic use of an audit programme;[160] and to identify areas where the law is either not operating in accordance with its policy intent or is producing significant compliance costs.[161] The former ensures effective use of resources and the latter ensures efficient operation of the system, in line with the principles set out in Chapter 3.

Revenue authorities mostly no longer use random auditing. Rather, they undertake comprehensive risk management analysis to identify the taxpayers or market segments where there is the greatest risk of non-compliance.[162] This allows them to allocate most of their resources to those areas where the risk of non-compliance is highest, while maintaining sufficient presence across all taxpayer and market segments to ensure that taxpayers are aware of them.[163]

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158 For a survey of the foundational audit research in this area, *see* J. Hasseldine, 'How Do Revenue Audits Affect Taxpayer Compliance?' (1993) 47 *IBFD Bulletin*, 424.

159 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10; OECD, *Strengthening Tax Audit Capabilities: Auditor Workforce Management*, above n. 10; OECD, *Strengthening Tax Audit Capabilities: Innovative Approaches to Improve the Efficiency and Effectiveness of Indirect Income Measurement Methods* (Paris, Centre for Tax Policy and Administration, 2006); and ATO, *Compliance Program 2006-07*, above n. 95.

160 J. Alm, B.R. Jackson and M. McKee, above n. 75.

161 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, p. 8 and ATO, *Compliance Program 2006-07*, above n. 95.

162 For example, *see* the research undertaken by the IRS, some of which is described in K.M. Bloomquist, above n. 83. This includes the development of compliance research in controlled laboratory environments: *see* J. Alm, B.R. Jackson and M. McKee, 'The Effects of Communication among Taxpayers on Compliance', Publication 1500 (2004) *IRS Research Bulletin*, 37, <www.irs.gov>, 1 October 2006. Further, J. Slemrod (ed.), *Why People Pay Taxes: Tax Compliance and Enforcement* (Ann Arbor, University of Michigan Press, 1992).

163 ATO, *Compliance Program 2006-07*, above n. 95.

The ATO, for example, has found that this is a useful approach.[164] For the ATO it works for managing risk and responding quickly to changing circumstances. For taxpayers, it educates them as the ATO consults with taxpayers and representative bodies to explain in advance the profile of high risk areas and to make clear what is expected of taxpayers in the event of an audit.[165]

There is a wide range of audit types. They vary in scope and intensity.[166] Depending upon the jurisdictional time limits, audits can cover a number of years. Most important in the exercise of the search and seizure powers of the revenue authority, audits may take place in whole or in part in locations including revenue authority offices, taxpayer business premises, taxpayer residential premises and the premises of third parties. This is discussed in more detail in the following sections.

In examining the best practice approaches to revenue audits and investigations, the modern compliance model neatly distinguishes between the two main approaches that revenue authorities take and the consequent rights that a taxpayer needs for protection. For taxpayers who want to comply, but who may make ignorant or careless mistakes, the aim of the audit is generally to educate them and to help them to improve their voluntary compliance.[167] For non-complying taxpayers who are either intentionally avoiding or evading tax, the audit is a strong enforcement mechanism.[168]

There is a gradation of rights that should be afforded to taxpayers going through the audit and investigation process. Where auditors are engaging with taxpayers to encourage voluntary compliance and instil confidence in the system, most of the lower level rights will form part of the good practices of any revenue authority. As an audit or investigation becomes more serious, the rights become more concerned with ensuring due process and natural justice. Thuronyi notes an important difference in audit procedure between common law and civil law country audits.[169] Whereas the procedures in

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164 Ibid.

165 Ibid.

166 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, pp. 9-11.

167 ATO, *Compliance Program 2006-07*, above n. 95; OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, ibid., p. 8; and National Tax Agency, above n. 70, p. 42.

168 Ibid. *See* also, K.M. Bloomquist, 'Multi-Agent Based Simulation of the Deterrent Effects of Taxpayer Audits', in National Tax Association, above n. 83, p. 159.

169 V Thuronyi, *Comparative Tax Law* (The Hague, Kluwer Law International, 2003), p. 213.

common law countries are fairly informal, those in civil law countries tend to be set out formally and in detail.[170]

A review of the rights in the different jurisdictions does not produce significant differences in their content. It is rather the means of enforcement that differs. Informal procedures contained in a revenue manual or audit guideline are likely to be primary or secondary administrative rights. Formal procedures set out in legislation are secondary legal rights, often supported by secondary administrative rights that provide the administrative process to implement the legal rights. Once again, the rights are usually similar, but the content and form differs according to the jurisdictional context.

For many jurisdictions, a sophisticated compliance model is simply beyond their capabilities.[171] The rights set out below are not tied to a particular compliance approach. However, the detailed content and extent of individual rights will grow as a revenue authority develops additional resources. Most are closely aligned to the improvement of voluntary compliance and form a logical part of any procedures implementing a compliance programme.

One of the most important issues facing revenue authorities is the capacity of their staff to perform audits at the required level.[172] To do this in a developing country there are several preliminary issues that must be dealt with, which have to be assumed for the Model. Yet, they go to the heart of an ability to implement the Model. If tax auditors are not paid enough and are coming into direct contact with taxpayers, the temptation to accept bribes and to pursue other corrupt practices is significant.[173] Tax payments should be made through banks and not directly to revenue officers; auditors need sufficient training; they need to understand the rule of law applicable in their jurisdiction; and they need to understand the principles of good tax administration outlined above.[174] The audit process is often the litmus test of whether a tax administration has reached the level of maturity to begin implementing taxpayers' rights. If the system is inherently arbitrary and corrupt, as discussed in Chapter 7, respect for the rule of law needs to be established before taxpayers' rights can have any meaning.

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170 Ibid., pp. 213-214. *See further*, C. Daiber, above n. 7, pp. 184-185. K. Ishimura, above n. 113, p. 237, notes that Japan conducts numerous voluntary audits, which are more informal and seen as a form of administrative guidance.

171 Discussed in the context of remedial measures in OECD, *Strengthening Tax Audit Capabilities: Auditor Workforce Management — Survey Findings and Observations*, above n. 10.

172 Ibid.

173 R.M. Bird, above n. 1, p. 141.

174 Ibid. and *see* C. Grandcolas, above n. 97.

2. The audit process

Flowing from the requirement for legal certainty and the provision of a legal basis for the exercise of administrative discretion, it is important that there should be a legal framework providing the powers to conduct audits and to impose sanctions.[175] The legal basis for the exercise of powers of tax administration is discussed in Chapter 7. Suffice to say, there is benefit in being specific in identifying the audit and investigation powers in legislation, as otherwise there is a degree of uncertainty, which invites taxpayers to seek judicial clarification. If the uncertainty is intended by the executive, there is a danger that the powers will be exercised arbitrarily.

The advantage of setting out clearly the legal framework for audit and investigation is to overcome challenges that may occur on the basis of discrimination or that the scope of an audit is too wide (fishing expeditions). Taxpayers will always try to invoke rights to attack legislation that may seem to offer support for their position. However, the history of such actions on these grounds to restrict audit powers properly exercised is not strong.[176] Nonetheless, the general principle of proportionality, and the requirement that discretion must be exercised in a way that is appropriate and necessary to achieve the objectives legitimately pursued, should apply. They will place limits on the information that the taxpayer has to provide, the time and resources that the taxpayer should be expected to invest in the audit, and the scope of the audit in the taxpayer's particular circumstances. It would not be appropriate, for example, for a revenue authority to impose requirements that would seriously impede the taxpayer's ability to carry on its business, without good reason.

In the context of the legality of an audit, it is important to note the protection provided by the requirement that the revenue authority should be autonomous, discussed in Chapter 7.[177] The US reinforces this autonomy in the context of tax audits and investigations, by making it an offence for a member of the Executive to interfere, including a prohibition on requesting that an audit be commenced or terminated.[178] The provision also requires the IRS official

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175 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, p. 12.

176 *See* the flavour of ECJ decisions in M. Lang (ed.), *Direct Taxation: Recent ECJ Developments* (The Hague, Kluwer Law International, 2003), and Canadian Charter decisions in J. Li, above n. 121.

177 *See* the concerns raised in South Korea, in J.K. Hyun, above n. 31, p. 345.

178 Internal Revenue Code § 7217. Discussed in A. Greenbaum, above n. 89, p. 368.

approached to report the matter to the Chief Inspector of the IRS. Other laws will normally prevent this type of interference in the activities of the revenue authority. However, where they do not, this is a recommended right to protect both taxpayers and revenue officers.

The revenue authority will prepare for any audit and will take full advantage, where necessary of the record keeping obligations contained in the relevant tax rules.[179] It will also use the information gathering powers discussed above. The information gathering powers are sometimes used outside the formal audit process. Where this occurs, similar rights should be afforded to a taxpayer. This will be particularly relevant where a taxpayer is required to attend an interview to provide information and evidence. The rights set out below would usually apply both to an audit and a formal interview of this kind. Once the revenue officer(s) concerned are ready to begin the audit, there are a number of procedures that should be followed in any audit:[180]

– The revenue authority should have a clear set of guidelines for its staff, setting out procedures to ensure consistent application of delegated authority, standards developed for audits, audit policies, audit procedures, and how and by whom interpretation of the law applicable to the audit will be carried out.[181] Under best practice guidelines, 'Audit policies and procedures should be based on principles of accuracy, efficiency, fairness, objectivity, transparency, completeness, consistency and defensibility'.[182] There should be separate guidelines for activities specifically authorized by law, to ensure that the legal requirements are met. For example, the ATO has a formal access manual to cover the application of the section of the law allowing the ATO access to information.

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179 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, pp. 13-14.

180 *See*, *e.g.*, ATO, *Audit Process*, and Taxpayers' Charter: Explanatory Booklet 10, *If you're subject to enquiry or audit*, <www.ato.gov.au>, 1 November 2006; IRS, *Internal Revenue Manual* <www.irs.gov/irm>, 1 November 2006; and the German Fiscal Code, *Abgabenordnung*. Some of the issues are taken from the ATO response to K. Burges, *Report on the Concerns of a Number of the Largest Companies in the Large Business Segment, with ATO Audit, Investigation, and Advice Procedures* (2005), <www.ato.gov.au>, 1 November 2006.

181 OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches*, above n. 10, p. 22.

182 Ibid., p. 33.

- Audit guidelines should provide for conflict of interest, where for example an auditor knows the taxpayer in some capacity.[183]
- A recommended right is that the revenue authority should not conduct an audit on a non-business taxpayer for two years in a row where there were no additional taxes payable after the first audit.[184]
- Taxpayers should be given prior notification of an audit, with brief details of the expected nature, scope and duration of the audit, the information and records that will be required, and the names and contact details of the revenue officers managing the audit.
- Taxpayers should be given the opportunity to request postponement of the audit if they have good reasons.
- Tax auditors should always clearly identify themselves, particularly where there is any risk of confusion, for example during a significant audit carried out over a long period of time and involving many revenue officers working at a taxpayer's premises.
- Before the commencement of the audit the audit process should be explained clearly and simply. The taxpayer should be given the opportunity at this time to ask for clarification and answers to questions, although this should not be seen as an opportunity to delay or hinder the audit. Explanations should include in some detail: why the taxpayer is being audited; the types of taxes and the relevant years; the information and records that will be required; full details of how the audit will proceed and relevant timeframes for the audit. If there is benefit to the taxpayer in making voluntary disclosure, for example a reduced level of penalty, this should also be explained at the beginning of the audit.
- Explanation of the audit process should include: the rights and duties of the taxpayer during an audit, the settlement practices of the revenue authorities and the avenues for objection and appeal against assessments arising out of the audit.
- Taxpayers should be advised of their right to have professional representation during the audit.[185] Professional advisers can slow the conduct of an audit, as they attempt to protect their client's interests, but this should not preclude their involvement. The right encompasses lawyers and other tax specialists. It is a common problem that lawyers do not always have the necessary tax expertise to provide appropriate

183 Ibid., p. 24.
184 Ibid.
185 N.E. Olsen, above n. 81, p. 1244.

representation, which means that taxpayers should have the right to representation by a tax specialist.[186]

- An audit should not interfere unreasonably with the proper running of a taxpayer's business or cause it to suffer commercial loss as a direct result of the audit activity. Meetings or interviews should take place, where possible, at mutually convenient times. Audits should usually take place in normal business hours unless otherwise agreed.
- Taxpayers should be given a reasonable time to collect information required unless search and seizure powers are exercised because the integrity or existence of documents is at risk.[187]
- Taxpayers should have the right to take notes of any conversations or interviews.[188]
- Taxpayers should have the right to request the recording of all audit interviews and be given a copy of the recording at the conclusion of the interview.[189] Recorded audit interviews can prevent subsequent disputes over what has been said or agreed between the parties.
- During the audit the taxpayer should be given the opportunity to discuss matters arising in the audit with the tax auditor. There should be discussion of the final issues arising out of the audit that will affect any assessment raised as a result of the audit, including disputed facts and their legal consequences. In the discussion, reasons should be given for adjustments, and opportunity should be given for the taxpayer to explain the circumstances that might justify a reduction of penalties or interest.[190] The outcome should be documented and provided to the taxpayer in writing within a reasonable time, together with any rights of review and remedies that may be available to the taxpayer.[191]
- In some audits, there can be negotiations to settle the outcome of the audit where these are permitted by law.[192] Negotiations should take

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186 *See* the discussion in C. Geppaart, 'Thresholds for Access to the Tax Court', in D. Albregtse and H. Van Arendonk, *Taxpayer Protection in the European Union* (London, Kluwer Law International, 1998), p. 35, p. 41.

187 ATO, Taxpayers' Charter: Explanatory Booklet 10, *If you're subject to enquiry or audit*, above n. 180, p. 5.

188 Ibid.

189 Ibid. *See also*, Internal Revenue Code § 7520. Discussed in A. Greenbaum, above n. 89, p. 350.

190 ATO, Taxpayers' Charter: Explanatory Booklet 10, *If you're subject to enquiry or audit*, above n. 180, p. 7.

191 N.E. Olsen, above n. 81, p. 1251.

192 *See*, *e.g.*, ATO, *Code of Settlement Practice*, <www.ato.gov.au>, 1 November 2006. The Australian courts have accepted a 'good management rule', which allows

place in the context of proper, fair and consistently applied settlement processes, recognized by law. The terms of any settlement agreement should be documented and the taxpayer provided with a copy.

– Taxpayers should normally be advised as early as possible of an intention to seek prosecution as a result of an audit so that rules of criminal procedure may apply.

3. Search and seizure

Search and seizure powers are usually used in the context of information gathering leading to or during tax audits, should be subject to strict limits, and should be used as a last resort.[193] However, given that revenue authorities rely on taxpayers to provide the information to assess the correct amount of tax, in certain circumstances search and seizure powers are necessary to obtain the information required to make the assessment.[194] There is scope for abuse of these powers. They have therefore been the subject of controversy in many jurisdictions.

The 2006 OECD Comparative Survey showed that all of the revenue authorities surveyed had powers to obtain relevant information from taxpayers and third parties.[195] Most had broad access powers to taxpayers' business premises and dwellings to obtain the information needed to verify or establish tax liabilities; if necessary by seizing those documents.[196] The point of contention is often whether a revenue officer should have to obtain a warrant before gaining access to premises. In almost two-thirds of countries surveyed

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settlements that are 'sensible and objectively justifiable in terms of good management and administration', para. 2.1.2. *See Grofam Pty Ltd v. FCT* (1997) 36 ATR 493 and Financial Management and Accountability Act 1997 (Cth), s. 44. The Australian position is analysed comprehensively in L.J. Priestley QC, 'Commissioner's Powers of Settlement and Compromise' (2002) 12 *Revenue Law Journal*, 40, including an analysis of the UK cases of *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Ltd* [1982] AC 617 and *Ali Fayed v. Advocate General* [2002] ScotCS 349.

193 European Convention on Human Rights, Art. 8. Reference can also be made the International Covenant on Civil and Political Rights, Art. 17, dealing with privacy rights.

194 M. McLennan, above n. 68, p. 34 *et seq*.

195 2006 OECD Comparative Survey, above n. 88, pp. 83-84 and pp. 88-90. *See* for detail on additional countries, A. Greenbaum, 'Tax Administration: A Comparative Look at Information Gathering Powers' in C. Evans and A. Greenbaum, above n. 25, p. 315.

196 Ibid., p. 84 and pp. 88-90.

a search warrant was required to enter a taxpayer's dwelling for any purpose.[197] However, only approximately one-third of countries surveyed required a search warrant to enter business premises and about one half of the countries required a warrant to seize taxpayers' documents.[198]

To understand why a warrant should or should not be required, the Canadian and South African examples are instructive. In Canada the right to privacy is guaranteed by section 8 of the Canadian Charter of Rights and Freedoms. Li notes that the original search and seizure powers were exercisable if the Minister believed that they were 'necessary for any purpose related to the administration and enforcement of the Act'.[199] This is similar to the previous powers of the Commissioner for Inland Revenue in South Africa, and the existing powers of the Australian Commissioner of Taxation.[200] In Canada, reasonable and probable cause was introduced in 1972 as an added requirement and application to the court for a search warrant had to be supported by evidence under oath.[201] It was nonetheless found to violate section 8 of the Charter of Rights and Freedoms in the 1980s so that in 1986 and again in 1994 further amendments were introduced to overcome legal impediments under section 8 to valid search and seizure.[202] Section 231 of the Income Tax Act provides that there must be a warrant; the judge must have judicial discretion in granting the warrant; there must be reasonable grounds to believe that a document or thing that may afford evidence of an offence is likely to be found; and the document or thing is likely to be found in the building, receptacle or place specified in the application.[203]

There were a number of distinctions drawn in the courts' consideration of privacy and the requirement for a warrant. Privacy for a personal residence, which required a warrant for audit purposes, was seen as more important than for business premises, which did not; and the expectation of privacy for business records was assessed as relatively low.[204] However, the exercise of criminal investigative powers does require a search warrant.[205]

In South Africa, Section 14 of the Constitution provides an extensive right to privacy. The search and seizure provisions of the Income Tax Act were

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197 Ibid.

198 Ibid.

199 J. Li, above n. 121, p. 109.

200 South African Income Tax Act no. 58 of 1962, s. 74(3); and the Australian Income Tax Assessment Act 1936 (Cth), ss 263 and 264

201 J. Li, above n. 121, p.109.

202 Ibid., p. 110.

203 Ibid., pp. 109-110.

204 Ibid., p. 110.

205 Ibid.

amended to take account of the new constitutional requirements in 1996.[206] The courts, in considering a similar provision, relied heavily on the Canadian cases.[207] They accepted the limitation on the constitutional right to privacy for search and seizure in a case similar to taxation, but followed the Canadian requirement for a warrant requiring judicial discretion.[208]

International and national human rights instruments have growing application. They almost invariably include a right to privacy. It is accepted that search and seizure for tax matters should limit that right.[209] There is not a general consensus that a warrant is required to search business premises or to seize business records. However, a majority of developed tax systems do require a warrant for search of private dwellings and the seizure of personal records and documents. A warrant is almost universally required for criminal investigations involving search and seizure. The Model should therefore reflect these practices.

When applying for a warrant, there are usually requirements for reasonableness and proportionality.[210] That requirement will be fulfilled if the magistrate or other judicial officer is satisfied that the revenue officer making application for the warrant has exercised her or his discretion in accordance with Article 6 of the Model. Article 6 of the Model applies also to exercise of search and seizure powers in relation to business premises and business records where a warrant is not required.

Normally, the powers of search and seizure are widely drawn to encompass random audits and information gathering from taxpayers and third parties. This can be justified on the basis that the more draconian powers are normally only used where the risks to revenue are greatest and access to information is hardest to acquire.[211] However, the powers should be used for their proper purpose.[212]

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206 Discussed in B. Croome, above n. 72.

207 *D.A. Park-Ross v. The Director, Office for the Investigation of Serious Economic Offences* 1995 (2) SA 198 (C). Discussed in R.C. Williams, 'Taxpayers' Rights in South Africa' in D. Bentley, above n. 7, p. 282.

208 R.C. Williams, above n. 207, pp. 292-294.

209 A. Hultqvist, 'Taxpayers' Rights in Sweden' in D. Bentley, above n. 7, p. 298 discusses the rationale in more detail, p. 302 *et seq*.

210 For example, Internal Revenue Code § 7605.

211 D.R. Tillinghast, above n. 109, p. 38. *See also*, Irish Revenue Commissioners, Statement of Practice, SP-GEN/1/94 (Revised 2006), 'Revenue Powers Exercised in Places Other than at a Revenue Office', <www.revenue.ie>, 1 November 2006.

212 Discussed in the leading Australian case of *Industrial Equity Ltd v. DFC of T* (1990) 170 CLR 649.

There are additional rights associated with exercise of powers of search and seizure. Unless the revenue authority believes that there is reasonable cause why it would hinder the purpose of the search, the taxpayer should be informed prior to the search taking place. Searches should take place during normal business hours or by appointment, unless the circumstances are exceptional. Taxpayer should normally be invited to attend during the search together with a representative. Opportunity should always be given to claim privilege on documents (discussed below).

Tax authorities have the right to seize information during an authorized search.[213] This would include computer disks and downloading computerised and other electronically stored data. Taxpayers would normally have a duty to translate or interpret information in a different language or form from the official language of the jurisdiction. However, taxpayers would have the right to a detailed receipt for anything taken, and an indication of when it would be returned. The taxpayer should also be able to insist that the tax authority copy the information, rather than taking an original, unless the original is crucial to the investigation, when the taxpayer should be permitted to make a copy before the information is taken. There are numerous situations that a revenue officer might face in enforcing access powers. It is therefore important for both revenue officers and taxpayers that the revenue authority publish guidelines on how access powers involving access to premises, searches and seizure of information will take place, together with details of the rights and obligations of taxpayers.[214]

4. Representation and privilege

It is generally acknowledged that taxpayers have the right to representation in tax matters. It flows from the principle of administrative fairness (discussed above) and forms part of the right to make representation, which is often through a specialist adviser.[215] Compliance with complex tax laws is difficult. Failure to comply may lead to criminal sanctions. In most countries, revenue authorities rely on tax specialists to represent and assist taxpayers to meet their tax obligations.[216] In many jurisdictions, representation in tax matters is often

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213 For example, the Malaysian Income Tax Act 1967, s. 80, and of the Singapore Income Tax Act, s. 65B.

214 For example, ATO, *Access Manual*, <www.ato.gov.au>, 1 November 2006.

215 M. McLennan, above n. 68, p. 45.

216 Discussed in V. Thuronyi and F. Vanistendael, 'Regulation of Tax Professionals' in V. Thuronyi (ed.), above n. 68, p. 135 and in V. Thuronyi, above n. 169, p. 228.

by non-legal tax specialists.[217] Accordingly, in any formal dealing with a revenue authority, taxpayers should be advised of their right to representation by a tax specialist and be given reasonable opportunity to seek it. Revenue authority procedures should not attempt to circumvent this right, for example, by asking for private interviews without a representative being present, or by intimating to the taxpayer that there might be a more favourable outcome if the taxpayer does not ask to be represented.

Certain information in most jurisdictions is protected as professionally privileged or secret.[218] Usually in both common and civil law jurisdictions it is based on the concept that certain communication between an individual and their confidential adviser should remain secret. In civil law jurisdictions this often extends to priests and medical practitioners.[219] In common law jurisdictions, it is inextricably bound up in the adversarial system.[220] Professionally privileged or secret information is generally designed to protect:[221]

> Confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client, and confidential material that records the work of a lawyer carried out for the benefit of a client unless the client has consented to the disclosure.

Privileged professional information means that the revenue authority is not entitled to the information contained in the documents covered. The basis for privilege is found in the confidential nature of advice given by lawyers and other privileged persons. It is seen as fundamental to the freedom of the individual.

The effective operation of the law and the legal system relies on lawyers being able to advise their clients as to the correct operation of the law. Such

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217 V. Thuronyi and F. Vanistendael, ibid., p. 142 discuss the relationship between legal and non-legal tax advisers.

218 Ibid., p. 146. *See*, J. Fish, *Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and certain other European Jurisdictions* (Brussels, Council of the Bars and Law Societies of the European Union, 2004) and 'Privilege: A World Tour' (December 2004/January 2005) *Global Counsel* 26, <www.practicallaw.com>, 1 November 2006.

219 For example, *see* C. Daiber, above n. 7, p. 173 and R.A. Sommerhalder and E.B. Pechler, 'Protection of Taxpayers' Rights in The Netherlands' in D. Bentley, above n. 7, p. 310, p. 314.

220 It is seen as underpinning the administration of common law justice, per Lord Brougham LC, in *Greenough v. Gaskell* 1 My. and K. 103, 39 E.R. 621.

221 McHugh J. in the Australian High Court in *Commissioner for Australian Federal Police v. Propend Finance Pty Ltd* (1997) 188 CLR 501, p. 550.

advice is based on a full and frank disclosure of the facts of each case.[222] If clients suspect that any information that they give might be revealed to a third party, they are unlikely to provide the necessary information and the system breaks down. Advice is given on the basis of incomplete information, and there is a strong risk that the taxpayer would act unlawfully.

Depending upon the jurisdiction, the restrictions on privileged information will differ. For example, it has long been held in the US that the information that is privileged must be for the purpose of confidential communication to the attorney, who must be acting as an attorney.[223] It is important to taxpayers, however, that within the framework of the legal system in which they reside, there is the protection of professionally privileged or secret information.

The rationale for privilege means that there is logic in extending it to all professionals giving advice on the interpretation and application of the tax rules.[224] The interest of the community in having effective representation by specialist tax advisers outweighs the disadvantages that arise from keeping such advice confidential. In many jurisdictions, accountants or their equivalent have taken over much of the traditional role of lawyers and advise on all aspects of the tax rules. They can sometime represent their clients in revenue tribunals or courts. It makes sense for privilege to extend to clients of these advisers where the advisers have a role to which privilege would attach if the role were undertaken by a lawyer. The issue does not appear to be as divisive in civil law jurisdictions, where the basis of privilege is not linked so closely to representation in court proceedings.[225]

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222 Set out, *e.g.*, in the Australian cases of *Grant v. Downs* (1976) 135 CLR 674 and *Baker v. Campbell* (1983) 153 CLR 52; in Canada, *Solonsky v. Canada* (1979) 105 DLR (3d) 745, pp. 755-757; in Germany, the German Fiscal Code, *Abgabenordnung*, s. 102(1); in New Zealand, *Commissioner of Inland Revenue v. West-Walker* [1954] NZLR 191, p. 219; and in the US, *Fisher v. United States* 425 US 391, p. 403 (1976).

223 This does not include financial accounts given to a lawyer to complete a tax return, *see Colton v. United States*, 306 F.2d 633 (2d Cir. 1962) and it affects tax attorneys with wide-ranging tax practices, *see* C. Brooks, 'A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners Often Lose Their Evidentiary Privilege' (2004) 35 *Texas Tech Law Review*, 1069.

224 R. Fisher, 'Confidential Tax Communication: A Right or a Privilege?' (2005) 20 *Australian Tax Forum*, 555.

225 For example, in Germany: the German Fiscal Code, *Abgabenordnung*, s. 102(1); and under Swedish law: see A. Hultqvist, above n. 209, p. 302. Compare The Netherlands, where tax consultants are given administrative privilege only: *see* R.A. Sommerhalder and E.B. Pechler, above n. 219, p. 314.

Many common law jurisdictions have become more open to extending privilege to non-lawyers providing tax advice.[226] The US and New Zealand have both legislated extension of privilege to communications between taxpayers and tax practitioners.[227] Australia has had a long history of providing administrative extension of privilege to accountants.[228] It is becoming more widely accepted that clients of tax practitioners, who are exercising the advisory role once dominated by lawyers, should be given the same privilege as they would receive had the advice been given by a lawyer. Given the discrepancy in approach between jurisdictions, it is appropriate to recommend this right in the Model as an example of best practice.

To the extent that privilege may be claimed on communications relating to tax matters, taxpayers should always be given the opportunity to claim that privilege. Otherwise, the basic rights of the taxpayer may be undermined by administrative process.[229]

5. Privilege against self-incrimination

The European Court of Human Rights has consistently upheld the privilege against self-incrimination, which incorporates the right of silence and the right not to be compelled to produce inculpating evidence.[230] In *Heaney and McGuiness v. Ireland*[231] it was found to be a generally recognized international standard, essential to a fair legal procedure:[232]

> It protects the accused against improper compulsion by the authorities, thus reducing the risk of miscarriages of justice and embodying

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226 R.R. Oliva, 'The CPA-Client Privilege under IRC § 7525: The Elusive Definition of "Tax Advice"' 2004 (2) *Journal of Legal Tax Research*, 103, discussing the US position; and K. Kendall, 'Prospects for a Tax Advisors' Privilege in Australia' (2005) 1 *Journal of the Australasian Tax Teachers Association*, 46, comparing the position in Australia, the US and New Zealand.

227 Internal Revenue Code § 7525 (US) and Tax Administration Act 1994, s. 20 (New Zealand). *See* the discussion in R. Fisher, above n. 224.

228 ATO, *Access and Information Gathering Manual* and ATO, *Guidelines to Accessing Professional Accounting Advisors' Papers* <www.ato.gov.au>, 1 October 2006, discussed in K. Kendall, above n. 226.

229 Discussed extensively in the Australian case of *FC of T and Ors. v. Citibank Ltd* (1988) 83 ALR 144 and *FC of T and Ors. v. Citibank Ltd* (1989) 20 FCR 403.

230 Commission of the European Communities, *Green Paper: The Presumption of Innocence* COM(2006) 174 final, pp. 7-8.

231 Case No. 34720/97 (21 December 2000).

232 Commission of the European Communities, above n. 230, p. 7.

> the equality of arms principle. The prosecution must prove its case without resort to evidence obtained through coercion or oppression.

Can this extend to investigations of tax matters where there are no criminal proceedings pending? Where most revenue authorities have extensive powers enabling them to require taxpayers to produce information and to answer questions, should the privilege against self-incrimination apply?

The European Court of Human Rights has explored the concept of a fair trial included in Article 6 ECHR. The right to procedural equality, (known as the equality of arms) is seen as implicit in the concept.[233] This includes the privilege against self-incrimination.[234] The privilege has been extended by the European Court to cover not only criminal but also civil proceedings, where the latter deal with administrative tax penalties or fines.[235]

Saunders v. United Kingdom[236] shows the particular relevance of the privilege to the power given to revenue authorities to require the provision of information and to question taxpayers before any charge is made or penalties imposed. Similar provisions under section 434(1) of the UK Companies Act 1985 were used to request information relevant to an investigation and to require Mr Saunders to appear before the investigators to answer questions, before any charges were laid. In later proceedings, the information obtained from Mr Saunders was used to refute what he said in his trial.[237] The European Court of Human Rights held it inappropriate that there had been legal compulsion to give evidence that was later used to incriminate Mr Saunders.[238] It found that:[239]

> The transcripts of the applicant's answers, whether directly self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant.

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233 *See generally*, S.N. Frommel, 'The European Court of Human Rights and the Right of the Accused to Remain Silent: Can It be Invoked by Taxpayers?' (1993) 7 *Tax Notes International*, 1245 and S. N. Frommel, 'The Right of Taxpayers to Remain Silent Under the European Convention on Human Rights' in D. Albregtse and H. Van Arendonk, above n 186, p. 81. Noted specifically in *Borgers v. Belgium*, judgment of 30 October 1991, Series A, vol. 214-B.

234 *Funke v. France*, judgment of 25 February 1993, Series A, vol. 256-A.

235 S.N. Frommel, 'The Right of Taxpayers to Remain Silent Under the European Convention on Human Rights', above n. 233, p. 82 and *see* P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review*, 211, p. 243.

236 (1997) 23 EHRR 313.

237 Discussed in S.N. Frommel, 'The Right of Taxpayers to Remain Silent Under the European Convention on Human Rights', above n. 233, pp. 83-85.

238 Ibid., p. 85.

239 Ibid., and *Saunders v. United Kingdom*, above n. 236, para. 72.

Frommel contrasts the extent of the European right to silence with the narrower privilege against self incrimination in the Fifth Amendment to the US Constitution, which does not extend to the contents of subpoenaed business records or to legal persons.[240] He notes that the right to remain silent in European law extends beyond criminal proceedings or potential criminal proceedings to any proceeding that could lead to the imposition of penalties or fines by tax authorities.[241] This is not the case in many jurisdictions.[242] However, given the moral force of the European Court of Human Rights, this should at least be a recommended right in the Model.

IV. Assessment

Self-assessment has become the main form of assessment; and where administrative assessment is used, it is largely automated.[243] This is consistent with the principles of efficiency and effectiveness. For taxpayers in any form of assessment system, as noted in Chapter 3, it is important also to have as much certainty as complex tax systems allow. Taxpayers (and revenue authorities) need to anticipate in advance the tax consequences of a transaction, including knowing when, where and how the tax is to be accounted.

In the interests of both certainty and fairness, it is important that as much information about the tax assessment process is published. That is why it was suggested above that the Model should require revenue authorities:

- to publish tax rules;
- to publish and disseminate a wide range of information in an appropriate form to assist taxpayers in understanding and complying with their full range of obligations; and
- to undertake a specific programme of community education to develop and reinforce an understanding of the importance to the community of the tax system and compliance with the obligations imposed by it.

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240 S.N. Frommel, 'The Right of Taxpayers to Remain Silent Under the European Convention on Human Rights', above n. 233, p. 92.

241 Ibid., p. 93.

242 P. Baker and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001) p. 50.

243 2006 OECD Comparative Survey, above n. 88, p. 57 and the Tables on p. 69 *et seq*.

Advance rulings represent a practical and mostly effective response to taxpayers' requests for clearer information on what are the revenue authority views on tax matters.

A. Advance rulings

Revenue authorities increasingly use advance rulings to aid certainty and predictability and rulings have become an integral part of most tax systems.[244] All countries participating in the 2006 OECD Comparative Survey except Russia issued either public or private rulings.[245] In most countries the rulings were binding in some form.[246] Public rulings usually provide general guidance on matters affecting classes of taxpayers and originate with the revenue authority. Private rulings usually provide guidance on specific matters raised by individual taxpayers in the context of particular facts and circumstances; they originate with the taxpayer. Public rulings can be binding on the revenue authorities, where the facts and circumstances of the taxpayer fall exactly within the ambit of the public ruling. In some jurisdictions they are for guidance only.[247] Private rulings are generally binding on the revenue authority, but they may also be offered only as advance guidance.[248]

Advance rulings provide taxpayers with the opportunity to determine the tax consequences of a transaction or arrangement in advance. Where tax rates can impact on commercial rates of return, this is an important business advantage. Taxpayers can decide whether transactions are worthwhile based on all of the facts, including those relating to taxation. They can also change the structure of transactions, where there are no adverse consequences, so that they fit more easily within the tax rules. It is particularly useful for taxpayers to obtain certainty in decision-making in jurisdictions where different revenue offices deal with their affairs. Where decision-making within the tax administration is decentralised to regional offices of the revenue authority there may

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244 For a comprehensive survey, *see* D. Sandler and E. Fuks (eds.), *The International Guide to Advance Rulings* (Amsterdam, IBFD, 1997-2003). Rationales for many current features can be seen in early discussion, *e.g.*, E. Andersson, 'Advance Rulings by the Tax Authorities at the Request of a Taxpayer' (1965) 50B *Cahiers De Droit Fiscal International*, 7.

245 2006 OECD Comparative Survey, above n. 88, p. 87.

246 Ibid.

247 Ibid.

248 Ibid.

be insufficient resources to ensure that all decisions across the jurisdiction are consistent. By obtaining an advance ruling taxpayers can have the assurance that they can rely on a decision that applies to all offices of the revenue authority.

When a revenue authority uses rulings to help taxpayers plan their transactions in advance, it has the potential advantage of reducing the incidence of dispute and litigation between the revenue authority and the taxpayer.[249] The advantage works both ways, as the revenue authority obtains information about the types of transactions that taxpayers are entering into. Where they can identify trends in taxpayer activities, revenue authorities can provide appropriate general guidance, or suggest changes to legislation to remedy shortcomings in the current law. It provides a way both for the revenue authority to counter emerging avoidance practices, while also protecting taxpayers who may be falling prey to widely marketed tax schemes that are held out to save them substantial tax. Rulings are designed to assist voluntary compliance, give taxpayers a sense that the revenue authority is giving fair warning of what action it is likely to take on a particular transaction, and generally reduce compliance costs.

In determining best practice, there are some rights that flow from underlying human rights. There are other rights that have only a general basis in the rights literature, but make sense as an accepted practice across a wide range of jurisdictions. They offer benefits to the administration of the tax system and are grounded firmly in the generally accepted principles set out in Chapter 3. A rulings system is the latter kind of right. It has become sufficiently widely accepted as best practice that all revenue authorities should try to issue rulings.

The 2006 OECD Comparative Survey shows that advance rulings in most OECD and many non-OECD jurisdictions are legally binding on the revenue authorities.[250] This is recommended best practice. However, for revenue authorities who do not have the resources to provide the necessary quality controls and administrative infrastructure to operate an effective system of legally binding rulings it may be too burdensome a requirement. Each system also needs the legal framework for a binding rulings system to operate. Accordingly, the provision of binding rulings is a recommended right in the Model.

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[249] Although this depends upon whether the taxpayer takes advantage of appeal rights in the ruling process: *see* D. Sandler, 'General Introduction' in D. Sandler and E. Fuks, above n. 244, p. x. *See further*, D. Bentley, 'A Proposal for Reform of the Australian Rulings System' (1997) 26 *Australian Tax Review*, 57 and D. Bentley, 'Advance Rulings: Lessons from the Swedish Model' (1997) 51 *IBFD Bulletin*, 210.

[250] 2006 OECD Comparative Survey, above n. 88, p. 87.

However, this gives rise to a problem for taxpayers in those jurisdictions where rulings or advice are not legally binding. Where a revenue authority holds out a particular interpretation of the law to be correct, or follows specific procedures in implementing the law, and the taxpayer relies in good faith on the view of a revenue authority, a revenue authority should be bound by its approach even if this is only as an administrative concession.[251] In civil law jurisdictions, the principles of good faith and legitimate expectation may apply.[252] In common law jurisdictions, the revenue authority may be bound under the principle of estoppel.[253] Most important, a taxpayer should not be penalised in any way for following exactly an approach to a transaction or arrangement that was apparently authorized by the revenue authority.

Where rulings are binding, due process suggests that there should be an appeal in some form available against an adverse ruling. Some jurisdictions, such as New Zealand, take the view that an appeal against a ruling wastes time and resources.[254] The argument is that taxpayers and the efficiency of the tax administration process are equally well served by the opportunity to appeal against the assessment raised on the basis of the ruling.[255] It is said that taxpayers may even have an advantage, in that they are not bound by a ruling and may withdraw their application before it is made, when they receive an indication that the ruling is likely to be adverse. A flaw in these arguments is that taxpayers often do not enter into commercial arrangements that are, or are likely to be, the subject of an adverse ruling.

It is difficult to take strong issue with an advanced tax jurisdiction, such as New Zealand, where tax administration practices are among the best in the world.

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[251] For example, *see* D. Sandler, 'Canada' and L. Harris, 'Israel', in D. Sandler and E. Fuks, above n. 244.

[252] For example, *see* C. Romano, 'Italy' in D. Sandler and E. Fuks, above n. 244.

[253] For example, *see* W.T. Cunningham, 'Ireland' in D. Sandler and E. Fuks, above n. 244.

[254] For a comprehensive comparison of the Australian and New Zealand binding rulings systems, *see* A.J. Sawyer, 'What are the Lessons for Australia from New Zealand's First Comprehensive Remedial Review of its Binding Rulings Regime?' (2000) 29 *Australian Tax Review*, 133. Sawyer raises concerns that the major flaw with the New Zealand rulings system is that there is no appeal against rulings made. It is discussed further in a UK analysis: W. Chan, 'Binding Rulings' (1997) 18 *Fiscal Studies*, 189. Sawyer discusses the arguments from New Zealand, on which this paragraph draws, in his earlier comprehensive analysis of the New Zealand system in A.J. Sawyer, 'Binding Tax Rulings: The New Zealand Experience' (1997) 26 *Australian Tax Review*, 11.

[255] This is the view taken in a number of countries. *See*, D. Sandler and E. Fuks, above n. 244.

However, it is perhaps different for a developing country that is trying to implement best practice in an environment where the administrative infrastructure is not well established and resources are stretched. If binding rulings are introduced in such a jurisdiction, the practice of providing an appeal in some form against the issued ruling should be preferred. It favours consistent due process and may encourage those making rulings to take more care if their decisions are open to review.

The form of the appeal will depend upon the review mechanisms that already exist in the relevant jurisdiction. Some jurisdictions will allow a review by a court.[256] Some require a request for a review or resubmission of the ruling request to be filed with the revenue authority, where a different revenue officer will review the original ruling for errors.[257] Others try to keep the review mechanism simple by offering an administrative review by a different body from that which made the original ruling, such as the Ministry of Finance.[258] The critical issue is that the time taken to appeal must not defeat the efficacy of the appeal process.[259]

B. Assessment to tax

The assessment process determines the amount of tax that taxpayers must pay. Under self-assessment, taxpayers assess their own tax in the first instance. Under administrative assessment an assessment is issued after either automated or physical verification of a tax return (where a tax return is required). In both types of assessment, verification and auditing may result in amendments or new assessments where a revenue authority finds discrepancies.[260] Significant effort is aimed at continually improving the 'design and operation of effective and efficient administrative arrangements for collection of tax and

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256 For example, Australia allows an objection against a ruling decision under the Taxation Administration Act 1953 (Cth), s. 14ZAZA, in the same way as an assessment, which takes the review to the Administrative Appeals Tribunal and the Federal Court.

257 For example, Thailand: *see* P. Tewkhunthong and V. Jangjedrew, 'Thailand', in D. Sandler and E. Fuks, above n. 244.

258 For example, the Republic of Korea: *see* Don Yang, 'Republic of Korea', in D. Sandler and E. Fuks, above n. 244.

259 D. Sandler, above n. 249, p. xiv and *see* as an example, the Australian decision of *CTC Resources NL v. FC of T* (1994) 48 FCR 397.

260 2006 OECD Comparative Survey, above n. 88, p. 60.

the determination of taxpayers' liabilities'.[261] The more tax collection can rely on third parties withholding tax at source, the less scope there is for tax avoidance and evasion by the taxpayer. The more tax verification can rely on efficient and effective data matching processes, the more confident a revenue authority can be in the validity and accuracy of its assessments. Third party withholding of tax and third party information reporting is integral to the operation of modern tax administration.[262]

For the taxpayer, it is important that taxes are imposed by law, and that the laws are accessible and certain. This was discussed in Chapter 6, as these are primary legal rights. Taxpayers should only have to pay the right amount of tax and any legal or administrative process that facilitates this should be encouraged. It is consistent with the principles in Chapter 3. However, taxpayers need certain assurance where tax they owe is collected from a third party, who is required to withhold amounts payable to those taxpayers at source, and remit those amounts directly to the revenue authorities.

Any amounts withheld must be sanctioned by law. This is critical to the operation of the law. Occasionally, it can lead to difficulties in the administration of the system. For example, where tax rates change in the annual budget, the tax withholding rates must change. In Australia, the legislation to give effect to the budget changes is sometimes delayed, which can cause administrative difficulties. However, it is important that any tax is withheld only where the law is in place to allow it. This protects both taxpayers and the withholder.

The 2006 OECD Comparative Survey notes the process involved in the pre-filled personal tax return systems used by Nordic countries.[263] It sets out the timelines that are required for effective operation of the system. This is consistent with the effective operation of any system for collecting or withholding tax. All parties must have adequate notice of the requirements and procedures that they must follow to comply properly with their obligations under the law. It should be included as a right for both taxpayers and withholders that the revenue authority must publish clear guidelines with reasonable timelines for any administrative process imposing an obligation to pay or withhold tax, or to report information.

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261 R. Highfield, 'Pre-populated income tax returns: The next ''big thing'' in reform of the administration of Australia's personal income tax system?', paper presented at the 7th International Tax Administration Conference (Sydney, Australia, 2006).

262 2006 OECD Comparative Survey, above n. 88, p. 55 *et seq*.

263 Described in more detail in R. Highfield, above n. 261.

Any information passed to the revenue authority must be kept confidential. This has been dealt with above. However, particularly where information provided by someone other than the taxpayer is used in making an assessment, the taxpayer should have the right to make sure it is accurate. This may be done easily through the process of making an objection to an assessment. It does depend upon the information provided to a taxpayer either with or on the notice of assessment.

The process of assessment of any kind should be governed by the principles of administration outlined above. This includes such issues as the provision of reasons for an amended assessment, timeliness in responding to queries and that any discretion is exercised appropriately.[264] The bad feeling engendered among taxpayers where they perceive that they are not receiving appropriate information can be seen in the codification of information that must be provided on US assessments following Taxpayer Bill of Rights 1. Greenbaum argues that codification assists the IRS, as it knows exactly what information it must provide and that this will in itself reduce litigation.[265] The appropriateness of this approach depends upon the system operating in any jurisdiction. The important principle is that there should be sufficient information given to taxpayers so that they know whether an assessment is accurate and therefore whether to object to the assessment made.

Where a revenue authority is reviewing a self-assessment or an earlier administrative assessment, the revenue officer should ensure that the taxpayer has paid the correct amount of tax.[266] The requirement is implicit that the revenue authority should correct errors in the taxpayer's favour. For example, this can happen where an assessor finds that a taxpayer is entitled to tax relief, deductions or refunds not previously claimed.[267] However, unless it was the revenue authority's fault that a claim was not made, the duty to inform the taxpayer would be limited to the relevant time limits.

Where a taxpayer is found on assessment to have paid too much tax and a refund is due, the refund should be made automatically. Interest should be paid

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264 Internal Revenue Code § 7522.

265 A. Greenbaum, above n. 89, p. 350.

266 M. McLennan, above n. 68, p. 37 and p. 41.

267 It would not be the case if the relief, deductions or refunds were optional and the taxpayer had chosen not to exercise that option. In other words, it is not the responsibility of the tax authority to act as a tax planner for the taxpayer. *See further*, OECD Taxpayers' rights and obligations, above n. 74, para. 2.20, where it is noted that not all countries automatically give tax relief where it is due, 'even if all the information is available to the authorities'. Failure to give relief in such circumstances would seem to be a breach of the duty to properly administer the tax system.

on the refund.[268] If a revenue authority has the use for a period of funds to which it is not entitled, it should pay for them. Otherwise, it is a further exaction of revenue from the taxpayer that should be authorized specifically by law.

It is important that there are procedures in place to regulate amendments to assessments. Normally there are time limits for amendments.[269] The obvious exception is where there is intentional fraud or tax evasion by a taxpayer; for example, where the taxpayer has intentionally provided incorrect information, entered into concealed transactions, or misled the tax authority. Time limits for amendment also normally coincide with the time limits for keeping tax records. This is appropriate, as once a taxpayer no longer has to keep records, it is unfair to allow a revenue authority to amend the taxpayer's assessment.

An area of significant contention between tax authorities and taxpayers is where the revenue authority decides that the information on which it is to base an assessment is insufficient or incorrect. On what basis can the revenue authority create an assessment? Most jurisdictions require some rational basis for an assessment: the revenue authority cannot simply pick a figure out of thin air. However much sympathy there may be for revenue authorities who have to deal with large numbers of recalcitrant taxpayers, it is precisely in such situations that taxpayers need protection of their basic rights and revenue authorities should maintain the moral high ground. It is important for the credibility of the tax system and the general compliance behaviour of taxpayers that the revenue authority observes due process in situations where it could be excused for not doing so. It is not enough to argue that if the taxpayer does not agree with the assessment that they can appeal. Accordingly, revenue authorities should maintain fairness and transparency by identifying and publicising in advance the procedures they will follow when assessing taxpayers in this situation.

V. Sanctions and enforced collection

A. Sanctions

Where the ordinary processes of assessment and collection are unsuccessful, revenue authorities require powers to impose criminal and administrative sanctions of some kind on those who refuse to comply in accordance with the

268 OECD Taxpayers' Rights and Obligations, above n. 74, p. 20.

269 Ibid.

law and to enforce collection of tax payable.[270] Collection ensures that the government is able to raise the amount of revenue due and payable by taxpayers. Sanctions are designed to provide a combination of incentives to comply with tax rules, and penalties for non-compliance. Dealing first with sanctions; they have been the subject of intense scrutiny over the years and constitute their own field of research.[271] A work of this kind can only incorporate those principles that appear to be accepted as best practice to govern the manner in which sanctions are imposed.

A New Zealand report to the Treasurer and Minister of Revenue by a committee of experts endorsed an earlier and similar kind of study on tax penalties in the US that:[272]

> Penalties can encourage those taxpayers who do not comply to do so, first, by setting and validating 'standards of behaviour' expected of taxpayers, secondly by deterring departures from these standards, and, finally, by providing taxpayers who depart from these standards with their just deserts.

Gordon argues that, 'sanctions are perhaps one of the most over-relied-upon, and poorly understood, tools for enhancing tax compliance'.[273] Gordon reviews literature pertinent to taxation and sets out some useful principles that should underpin any framework of sanctions in taxation. They can be summarised very broadly as follows:[274]

- As a deterrent of unwanted behaviour, sanctions should apply to negligent or unreasonable behaviour resulting in underpayment.
- Sanctions should be fair, involve fault, not be harsh or disproportionate, and should follow due process.

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270 J. Braithwaite, above n. 105, describes the growing enforcement challenges tax administrations face with the growth of aggressive tax planning internationally.

271 In the tax field, see J.G. McCubbin, above n. 96.

272 Treasury (New Zealand), *Tax Compliance: Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (1998), p. 210, reviewing a study, US Internal Revenue Service, *Report of the Commissioner's Executive Task Force on Civil Penalties* (1990).

273 R.K. Gordon, 'Law of Tax Administration and Procedure' in V. Thuronyi, above n. 68, p. 95, p. 117. Supported by J. Braithwaite, above n. 105, p. 177 *et seq*. who describes the tendency of tax administrators and legislators to see-saw between punishment and persuasion.

274 R.K. Gordon, ibid., pp. 117-134.

- Financial sanctions may be imposed to deter and encourage early settlement of disputes but should not be used to raise revenue: that should be the place of the taxes themselves.
- The level of sanction or penalty should reflect society's view of the heinousness of the behaviour and can include a retribution component.
- The level of publicity about the sanctions, the effects of non-compliance, and the rates of detection of non-compliance, depend very much upon the particular jurisdictional and societal context. However, sanctions will be 'ineffective unless taxpayers believe that there is sufficient likelihood that they will be caught and that the sanctions will actually be applied'.[275]
- Sanctions that are easily applied and determined are usually easier to administer and less arbitrary. Therefore, automatic financial penalties calculated as a percentage of the amount involved are likely to be most effective. They should be applied to negligent or unreasonable failure to pay the correct amount of tax or to pay it on time.
- To encourage early dispute resolution, a penalty framework could require that: all disputed amounts and penalties should be paid at the outset, or interest should be paid on outstanding amounts, and/or penalties should reduce with early settlement.
- Evasion and fraud are difficult to prove, but should form part of the framework of criminal sanctions. The general rules of criminal procedure should apply to these crimes.

Penalty regimes vary significantly, but Gordon's principles provide a sound basis for the design of higher level protection of taxpayers' rights that will cover most such variations.[276] It is in the specific and particular context of penalties that the best approach for the Model is to focus on general principles. It would be too complex and would likely prove unhelpful to attempt to address the plethora of jurisdictional variations. The Model would lose its meaning as a guide to best practice.

Penalties should be distinguished from interest charged on late payment of tax. Interest is almost invariably applied.[277] However, it will often include a penalty by way of a surcharge,[278] and the same principles are applicable to such penalties as they are to other sanctions.[279]

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275 Ibid., p. 130.

276 *See further*, along similar lines, N. Brooks, above n. 78, pp. 30-31.

277 2006 OECD Comparative Survey, above n. 88, p. 84 and pp. 93-96.

278 Ibid.

279 Treasury (New Zealand), above n. 272, p. 205.

Where sanctions are laid down in statute, they will usually follow a common approach to sanctions applied across the legal system; although Gordon notes that this cannot be assumed.[280] In any event, the primary legal rights applicable to the imposition of taxes and set out in Chapter 6 and the first part of the Model apply equally to the imposition of sanctions associated with taxation. They include the requirements for the proper exercise of discretion by the revenue authority. The latter will prove particularly important where the sanctions depend upon satisfaction of different tests of reasonableness that are assessed by revenue officers. For example, both Australia and New Zealand have developed comprehensive penalty regimes that depend in part upon an assessment of 'reasonable care' and 'reasonably arguable' or 'unacceptable' positions.[281]

Application of these rules addresses Gordon's explicit and implicit requirements that the sanctions are not arbitrary, but are certain, published, fair, consistent, proportionate, linked to the seriousness of the offence, and recognize due process in their application.[282] Nonetheless, given the importance of these principles, it is valuable to reiterate those that are specific to the application of sanctions in the Model.[283]

There should be a clear basis for the imposition of penalties and interest.[284] Where revenue authorities have discretion as to the level of penalties and interest, it should be clear how and why the discretion is exercised.[285] In the exercise of discretion the principle of proportionality requires that the penalty should be proportionate to the offence.[286]

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280 R.K. Gordon, above n. 273, p. 118.

281 Extensive explanation of the systems in both countries can be found on the respective revenue authority websites: Australia, <www.ato.gov.au>, 1 November 2006, and New Zealand, <www.ird.govt.nz>, 1 November 2006.

282 Reinforced in The Netherlands context, in A. Smit, 'The Taxpayer, the Tax Inspector and Administrative Fines' in D. Albregtse and H. Van Arendonk, above n. 186, p. 95.

283 Supported in the French context, in C. David, 'Taxpayer Protection and Tax Fines in France', in D. Albregtse and H. Van Arendonk, above n. 186, p. 99.

284 *See* the problems in Mongolia and South Korea, where penalty provisions are rarely implemented: J.K. Hyun, above n. 31, p. 345.

285 OECD Taxpayers' Rights and Obligations, above n. 74, para. 3.29 and para. 3.37 *et seq*.

286 J. Braithwaite, above n. 105, pp. 181-182, argues that this requires adequate and escalating penalties to cater for the growing seriousness of the offence. He argues also, p. 199 *et seq*., using a restorative justice framework, that the heaviest penalties should be reserved for the advisers and promoters of fraudulent tax schemes and not the taxpayers.

The general principles governing exercise of discretion in Article 5 of the Model are particularly relevant to discretion as to the level of penalty.[287] As they stand, they are clear enough: namely, that they should be based on reasons, applied consistently, fairly, and impartially; that the reasons are based on a framework of equally intelligible standards that can be seen fairly to fall within and be the basis of the discretionary powers; and that the exercise of any discretion to impose penalties is fair and reasonable in matters of procedure and substance.[288] Care needs to be taken in tailoring penalties to a range of situations, as it can make them very complex and difficult for taxpayers to understand.[289]

Revenue authorities are very aware of the importance of these principles in pursuing best practice. A major focus of an Australian review of the self-assessment regime was to 'mitigate the interest and penalty consequences of taxpayer errors arising from uncertainties in the self assessment system'[290] and 'to improve the transparency and fairness'.[291] This was similar to the earlier approaches taken in the US and New Zealand.[292] Best practice suggests that there should be some flexibility in remitting penalties where there are exceptional circumstances relevant to the taxpayer.[293] However, Thuronyi points out that any discretion in imposing penalties opens the possibility for corruption or heavy handedness.[294] A recommended right should therefore apply in those jurisdictions where there is exercise of discretion in relation to penalties that there should be clear and transparent guidelines as to when waiver of a penalty will occur.[295]

Criminal penalties for offences such as fraud and evasion are best contained in the criminal law code. The rationale for this is that the general

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287 A. Smit, above n. 282, p. 97.

288 Treasury (New Zealand), above n. 272, p. 210 and in the US, *see* R. Manning and D.F. Windish, 'The IRS Restructuring and Reform Act: An Explanation' [6 July 1998] *Tax Notes*, 95-103.

289 Treasury (Australia), *Report on Aspects of Self Assessment* (Canberra, Commonwealth, 2004), pp. 39-47, and V. Thuronyi, above n. 169, p. 222.

290 Treasury (Australia), above n. 289, p. 5.

291 Ibid., p. 4.

292 Above n. 272.

293 OECD Taxpayers' rights and obligations, above n. 74, para. 3.26; Treasury (Australia), above n. 289, p. 41. *See also*, the fairness legislation in Canada, which allows account to be taken of personal misfortune or circumstances beyond a taxpayer's control: J. Li, above n. 121, p. 120.

294 V. Thuronyi, above n. 169, p. 221 and G. Turley, above n. 16, p. 37.

295 V. Thuronyi, above n. 169, p. 222.

rules of criminal procedure should apply.[296] Where criminal penalties are imposed in different codes, it is normal for special procedures to apply nonetheless to a criminal investigation.[297] It has important practical consequences, in that when a civil case turns into a criminal case, there are different rules governing procedure, including such matters as the privilege against self-incrimination, discussed above. However, most jurisdictions have no problem with the revenue authority conducting a case that may result in criminal prosecution until such time as it is turned over to the department responsible.[298] It is logical given the special skills of revenue authority investigators in interpreting available information. However, given the stricter requirements governing the use of evidence in criminal trials, the revenue authority officers involved in such investigations will need appropriate training to ensure that they do not undermine an effective prosecution case by using methods that are unacceptable in court.[299]

Taxpayers should be provided protection against unreasonable discriminatory prosecution on the basis of such things as race, religion or status under Article 10 of the Model. For example, because of the publicity such prosecutions engender, prosecution policies may well identify public figures as providing a more effective deterrent to other taxpayers than would an unknown taxpayer;[300] but that should not be the only basis for a prosecution. The prosecution should have a legitimate aim.

B. Enforced collection

The 2006 OECD Comparative Survey suggests that ideally enforcement powers and procedures should be included in a single comprehensive law on tax administration that covers all taxes.[301] There will always be some overlap with other legal provisions and care needs to be taken in ensuring that the tax administration provisions work with other existing rules.[302] Given the

296 R.K. Gordon, above n. 273, p. 134.
297 V. Thuronyi, above n. 169, p. 226.
298 Thuronyi supports this view in his comparative analysis of the treatment of tax crimes, ibid., pp. 223-227.
299 Ibid., pp. 226-227.
300 OECD Taxpayers' rights and obligations, above n. 74, p. 19 and Deak, above n. 122, p. 212.
301 2006 OECD Comparative Survey, above n. 88, p. 85.
302 V. Thuronyi, above n. 169, p. 220.

variations in approach, the Model can provide only general principles applicable to enforced collection of tax debts.

The general principles already contained in the Model and applicable to sanctions are equally applicable to enforced collection of tax debts for the same reasons. In particular, there must be a clear basis for any decision to pursue collection through enforcement.[303] Where revenue authorities have discretion to pursue collection through enforcement, it needs to be made clear how and why the discretion is exercised.[304] In the exercise of discretion the principle of proportionality requires that the means of enforcement should be proportionate to the tax payable.[305]

It is impossible to determine at what point enforcement proceedings should be taken against taxpayers: it depends upon the circumstances of each case and the risk that the tax authorities believe that there is to the revenue. The decision is a matter of judgment. However, the general principle requiring reasons applies and taxpayers should be entitled to be given reasons why a decision has been taken. They should also have the right to appeal against enforced collection decisions as part of the general appeal rights discussed in the next section.[306]

In the US, Collection Due Process Hearings were introduced in 1998 as it was felt that taxpayers needed an early independent review of proposed IRS collection actions.[307] National Taxpayer Advocate Olsen argued strongly that they represent an early hearing opportunity to bring the sanity of a third party, in this case the court, into what are some of the tensest dealings that taxpayers and a revenue authority can have.[308] The rationale coincides with those for early collection hearings in other countries, including the very successful preliminary conferences held in Australian Administrative Appeals Tribunals.[309]

Olsen makes the point that there will be frivolous arguments at these hearings, but the taxpayer is hearing from a court that they are frivolous, rather than from the IRS, and is less likely then to continue pursuing the issue through

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303 OECD Taxpayers' Rights and Obligations, above n. 74, para. 3.33.

304 G. Turley, above n. 16, p. 113.

305 In Sweden, *see* A. Hultqvist, above n. 209, p. 307; in Japan, *see* National Tax Agency, above n. 70, p. 85 *et seq*.

306 In Australia, *see* K. Wheelwright, above n. 118, p. 84.

307 Internal Revenue Code § 6320 and § 6330.

308 N.E. Olsen, above n. 81, p. 1248.

309 Discussed in L Boulle, *Mediation: Principles, Process, Practice* (2nd edn., LexisNexis Butterworths, 2005), p. 127 *et seq*.

the court process in protracted proceedings.[310] She also notes that the hearings have identified several major breaches of taxpayers' rights that are ongoing matters of principle, and have ensured that the focus in collection proceedings is on substance rather than form.[311] These are issues that fit squarely within the dispute resolution model discussed in Chapter 5. It is therefore recommended that where a jurisdiction has the resources, an early collection hearing should be available to taxpayers on the due process of the collection.

Taxpayers should be given appropriate notice and reasonable time to comply with demands for payment before enforcement measures are taken.[312] All such notices should include details of the taxpayer's rights and obligations in relation to enforcement, including the right to representation and the availability of legal aid.

The 2006 OECD Comparative Survey notes a number of powers that are widely used to enforce collection and several of these require the exercise of discretion by revenue officers.[313] Two of the most important are the discretion to grant extensions of time to pay and to formulate tax payment arrangements.[314] Revenue authorities should provide clear guidelines on exactly how the discretion will operate and how they will make decisions involving enforcement. Normally special arrangements in relation to enforcement will be based on hardship.[315] The onus of proving hardship in such cases should be reasonable. Agreements that allow a taxpayer to use payment methods that differ from normal collection requirements, such as instalment payments, should be binding on the tax authority.[316] Guidelines on the operation of deferred payment arrangements should include such matters as the quantum of basic living allowances that will be taken into consideration while taxpayers pay off their tax debts, the consequences of failure to meet a payment or instalment, and when the tax authority can resile from an agreement. More than in most administrative decisions, there should be a right of review of the decision of the revenue authorities in hardship cases.

Protection for the taxpayer should increase with the severity of the enforcement measures. Common collection methods include collection through specific third parties who owe money to a taxpayer or hold money

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310 N.E. Olsen, above n. 81, p. 1249.

311 Ibid.

312 C. Daiber, above n. 7, p. 186 discusses the legislative requirements in Germany.

313 The 2006 OECD Comparative Survey, above n. 88, p. 86.

314 OECD, GAP002, above n. 23, p. 10.

315 R. Manning and D.F. Windish, above n. 288, 97-99.

316 In Canada, *see* J. Li, above n. 121, p. 119.

on their account; the use of offsets against amounts owed to taxpayers for other taxes; seizure action; and bankruptcy or liquidation.[317] Liens, travel restrictions and disqualification from tendering for government contracts are other methods used.[318]

A general expectation is that the revenue authority would take such actions very seriously and provide clear lines of authorization and monitoring mechanisms to ensure that the exercise of such powers did not breach its obligations. For example, injunctions taken out by a revenue authority to prevent a taxpayer disposing of property, or placing restrictions on a taxpayer's movement, require careful monitoring to ensure that due process is followed.

There are areas of concern to affected taxpayers that will arise in each jurisdiction depending upon the particular rules. Although they are usually covered under the general principles of administration, they should also be included specifically in the guidelines governing decision-making on enforcement. For example, where a tax authority exercises its right to seize and dispose of a taxpayer's property the tax authority should take steps to realize the property for the best possible price. There should be limits on the seizure and sale of property that has a high value, where the amount of tax owing is very small in comparison. The tax authority should also have guidelines that enforce restraint and negotiation with the taxpayer where tax owing is seized from third parties that hold property for, or have debts due to the taxpayer. Otherwise serious damage can occur to a taxpayer's reputation or business, which may be out of all proportion to their tax debt.

There are other common sense principles that fall within the broader principles of reasonableness and proportionality, which are generally applicable and should be covered in the decision-making guidelines. For example, taxpayers should be left with sufficient to allow them to live without being an unnecessary burden on the state. The issuer of a warrant to seize assets would have to take into account the principles of proportionality and reasonableness in setting the conditions for the exercise of the warrant. It is pointless depriving taxpayers of their means of livelihood in order to pay a tax debt, if they are thereby reduced to penury, lose their ability to make any future repayments, and are forced to rely on benefits provided by the state to survive. The rights of children and those with disabilities should be protected elsewhere in the law where enforcement proceedings are taking place. If they are not, then the tax rules should make specific provision for them.

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317 Ibid., and R.K. Gordon, above n. 273, p. 108.

318 Ibid.

Where a taxpayer has been restrained from dealing with an asset until a debt is paid or other arrangements are made, the payment of the debt or effecting of other arrangements does not necessarily ensure release of the restrictions over the asset. Bureaucratic delays can maintain the restriction for unnecessarily long periods. A requirement that release should be within a specified time period protects taxpayers in this situation. Failure to release a restriction within the specified time should leave the taxpayer with the right to compensation, usually for actual economic loss and reasonable costs, under the right to compensation outlined below.

Cross-border enforcement of tax obligations usually takes place under bilateral or multilateral agreements in much the same way as exchanges of information, discussed above.[319] The protection required is similar and is included in the Model with that relating to information exchange.

VI. Objection and appeal

A. Appeal and natural justice

The IMF *Manual on Fiscal Transparency* notes the importance of the ability to challenge the legality of actions and decisions within the tax system.[320] The right of appeal was seen as fundamental to the operation of the tax system in the 1990 OECD survey of taxpayers' rights and obligations.[321] It is defined:[322]

> The right to appeal against any decision of the tax authorities applies to all taxpayers, and to almost all decisions made by the tax authorities, whether as regards the application and interpretation of the law or of administrative rulings, provided the taxpayer is directly concerned.

Much of the content of the Taxpayers' Charter contained in the OECD Centre for Tax Policy and Administration Practice Note on Taxpayers' Rights and

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319 For a comprehensive analysis, *see* M.A. Grau Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (The Hague, Kluwer Law International, 2003).

320 Fiscal Affairs Department, *Manual on Fiscal Transparency* (Washington DC, IMF, 2001), p. 11.

321 OECD Taxpayers' rights and obligations, above n. 74, p. 12.

322 Ibid.

Obligations comprises details of a taxpayer's appeal rights in practice.[323] Baker and Groenhagen argue that the consistency of international consensus on appeal matters allows the setting of international standards for tax administration.[324]

Taxpayers require the right to object to assessments, have access to dispute resolution mechanisms and to appeal to a court or administrative tribunal of independent status.[325] Access to dispute resolution mechanisms, both within the revenue authority and to third parties, was discussed in Chapter 5 in relation to enforcement of taxpayers' rights. The same rights of review and dispute resolution mechanisms generally apply to the way the tax law is administered. However, objections to tax decisions themselves and appeals on tax matters are primarily concerned with the application of the full range of substantive tax rules to taxpayers and the objection and appeal rights are therefore much wider.[326]

Nonetheless, as discussed in Chapters 5 and 7, disputes are best resolved early and quickly and Article 12 of the Model provides for a dispute resolution system designed to provide an informal mechanism for early resolution of disputes arising between taxpayers and the revenue authority. The principles of good practice identified in Chapter 7 require that a revenue authority should clearly identify its complaint procedures and provide easy access to them for taxpayers. Most disputes are resolved in this way. It makes administration more effective and compliance easier.

However, not all disputes are resolved at this level and most jurisdictions have a hierarchical range of appeal procedures that allow them to contest the merits of a tax assessment.[327] In some jurisdictions this extends to allow the contest of adverse rulings and other matters.[328] The right of appeal is an essential ingredient in the principle of openness and accountability in government. The office of ombudsman, described in Chapter 7, provides avenues of complaint against administrative procedures that are not otherwise subject to review by a court or tribunal.

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323 OECD, GAP002, above n. 23, p. 9.

324 P. Baker and A.M. Groenhagen, above n. 242, p. 50.

325 National Tax Agency, above n. 70, pp. 116-118.

326 Lord Woolf, 'Tax and Judicial Review' [1993] *British Tax Review*, 219.

327 OECD Taxpayers' Rights and Obligations, above n. 74, p. 12 and p. 21.

328 *See* the discussion on Rulings above, and *see e.g.*, the countries in the 2006 OECD Comparative Survey, above n. 88, p. 87, with binding rulings. Several of these jurisdictions allow review of adverse rulings.

Most appeal processes begin with an internal review of an objection before the decision is confirmed and an appeal is taken further.[329] This allows the identification of obvious errors. The right of subsequent appeal is usually to a tribunal of some kind that is independent of the tax administration. Many jurisdictions have found that a tribunal specialising in tax matters is most appropriate at this level.[330] There is a range of country practices as to the operation and constitution of tribunals.[331] Interestingly, it was found in Australia that introducing mediation/arbitration in the form of conferences preliminary to a tribunal hearing, reduced the cases that went forward to a full hearing by over 80 per cent.[332] Many tribunals use informal procedures rather than using the formal requirements of a court hearing.[333]

From the first level of appeal, most jurisdictions allow further appeal, sometimes to a tax court and sometimes through the normal court appeals procedures.[334] The analysis in Thuronyi and Albregtse and Arendonk demonstrates the wide variation in courts and procedures.[335] Thuronyi notes, for example, that once US tax appeals move into the general court system, there is little uniformity of approach and even the Supreme Court 'leaves the law in as confused a state after its decision as it was before'.[336] Thuronyi further points out that the court system can offer taxpayers very low rates of success and gives Japan as an example of 'where the low rate of success of taxpayers in court is striking'.[337]

Given the erratic outcomes in the normal court system for tax matters, there is a strong basis for supporting the recommendations that there should be

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329 R.K. Gordon, above n. 273, p. 105.

330 Recommended also in W.M. Hussey and D.C. Lubick, *Basic World Tax Code and Commentary* (Arlington, Tax Analysts, 1992), p. 178 and p. 253 and commonly used: OECD Taxpayers' Rights and Obligations, above n. 74, p. 12.

331 OECD Taxpayers' Rights and Obligations, above n. 74, p. 12; V. Thuronyi, above n. 169, p. 220; and R.K. Gordon, above n. 273, p. 106.

332 L. Boulle, above n. 309, p. 127 *et seq*.

333 For example, the Australian Administrative Appeals Tribunal exercises the powers and discretions of the Commissioner of Taxation in its determinations. *See further*, D. Mighalls, 'The AAT or Federal Court — Which is the Appropriate Forum?' (2005/6) 40 *Taxation in Australia*, 90.

334 OECD Taxpayers' Rights and Obligations, above n. 74, p. 93.

335 V. Thuronyi, above n. 169, pp. 215-220; and D. Albregtse and H. Van Arendonk, above n. 186.

336 V. Thuronyi, above n. 169, p. 218.

337 Ibid.

a specialised tax court or tribunal at least at the first level of appeal.[338] Despite the idiosyncrasies of the different systems, as Baker and Groenhagen suggest, there are certain standards that characterise best practice in review hearings, whether at tribunal or court level.

As noted above, taxpayers should have the right to object to assessments and to appeal on as wide a range of decisions and actions of the tax authority as possible.[339] Taxpayers should be informed of their right and any time limits that apply.[340] Most revenue authorities include a notice of complaint, review and appeal rights with each notification they give to a taxpayer of a decision. This is logically a very effective way to ensure taxpayers are aware of their rights. Practically, the notice will include contact details for taxpayers who require further information or assistance (including, for example, an interpreter) in understanding their rights and obligations.

The court or administrative tribunal should be independent. The extent to which the right to a fair trial under Article 6 of the European Convention on Human Rights ('ECHR') is applicable to tax matters is disputed.[341] However, once the right of appeal or review is accepted, it offers useful guidance on the content of that right in an accepted international context. The European Commission on Human Rights has emphasised the importance to review proceedings of having at least one level of review that is independent from both the department of the executive that made the decision under review and also

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338 OECD Taxpayers' Rights and Obligations, above n. 74, p. 22. This was the rationale for the introduction of a National Tax Tribunal in India in 2005, rather than continuing to send appeals to the High Courts, *see* A. Ponniah, 'Asia-Pacific: 2005 Developments' (2006) 12 *Asia-Pacific Tax Bulletin*, 117, p. 128.

339 *See further* in respect of criminal charges, the 1948 Universal Declaration of Human Rights, Art. 10, and ECHR, Art. 6, which states that 'everyone is entitled to a fair and public hearing within a reasonable time'. For tax matters specifically *see e.g.*, OECD, Taxpayers' rights and obligations, above n. 74, p. 12 and W.M. Hussey and D.C. Lubick, above n. 330. For general discussion in a tax context, *see* S.N. Frommel, 'The European Court of Human Rights and Taxpayers: The Right to a Fair Trial', above n. 233, p. 1723. I. Saunders, 'Judicial Review: Successes for the Taxpayers' (1997) 2 *British Tax Review*, 105; and Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (1994) 1 *Australian Journal of Human Rights*, 1, discuss specifically the importance of opening appeals as widely as possible.

340 OECD, Taxpayers' Rights and Obligations, above n. 74, p. 12 and OECD, GAP002, above n. 23, p. 9.

341 Analysed comprehensively in P. Baker, above n. 235.

from the executive arm of government itself.[342] The independence requirement did not mean that the executive could not appoint members of the tribunal or court, as occurs in most jurisdictions.[343]

There are two elements to reasonableness of time. The review or appeal should be heard within a reasonable time. Baker notes that there have been several cases before the European Court that have considered this issue, but that it is difficult to gauge what a reasonable time is.[344] This is an issue that is peculiar to each jurisdiction depending upon the review structure, its resources and capacity. It is important, however, to stipulate that the hearing should take place within a reasonable time. This provides grounds for review in the context of the particular jurisdiction. There is otherwise a danger that the revenue authority or the taxpayer could unnecessarily delay proceedings to prevent a hearing. The second time element, that a right of appeal may be subject to time limits, is along the same lines. The criterion of reasonableness should be applied for similar reasons. However, it also means that time limits should be stipulated in order that they may be reasonable.[345] Unless they are clearly set out for taxpayers, they become arbitrary.

The conduct of the review or appeal should be subject to due process or a fair hearing. This comprises a number of elements, discussed in turn. The hearing should be impartial. This means that the hearing is before a judge or member of a tribunal who is neither personally biased, nor biased on the basis of her or his actions in the proceedings.[346]

'Publicity is seen as one guarantee of the fairness of trial; it offers protection against arbitrary decisions and builds confidence by allowing the public to see justice being administered'.[347] Many jurisdictions do not hold public hearings at all levels for tax and administrative decisions, but a public hearing at some stage of the appeal process supports the fairness requirement.[348] Taxpayers may wish to waive their right to a public hearing, or at least

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342 *HWK v. Switzerland* Application No. 23399/94, discussed in P. Baker, ibid., p. 241.

343 P. Baker, above n. 235, p. 242.

344 Ibid., p. 239.

345 OECD, Taxpayers' Rights and Obligations, above n. 74, p. 22 and OECD, GAP002, above n. 23, p. 9.

346 Discussed in the context of ECHR, Art. 6, in C. Ovey and R. White, above n. 37, p. 160.

347 Ibid., p. 163.

348 Ibid. P. Baker, above n. 235, p. 242; and OECD, Taxpayers' Rights and Obligations, above n. 74, p. 22.

publication of the decision. They may have legitimate concerns that publication of details of their case would unnecessarily prejudice their business or their reputation. Alternatively, they may be concerned not to have their private financial records discussed in a public forum and included without preservation of anonymity in a public record of the decision. Taxpayers should be able to waive their right to a public hearing.[349] Waiver may be opposed by the revenue authority where one of the purposes of the action is to generate as much publicity as possible. This may legitimately occur, for example, where the revenue authority is undertaking a high profile campaign to publicise the effects of non-compliance.[350] It would be up to the court or tribunal to determine whether the fairness of the proceedings would be undermined by a public hearing.

Due process includes the right to representation by a lawyer.[351] In addition to legal representation, most countries recognize the right to representation in tax proceedings before a tribunal, and sometimes a lower court, by a representative other than a legal adviser.[352] There is no general requirement for legal aid to assist taxpayers in bringing tax appeals, unless it involves a criminal charge.[353] In most developing countries the resources simply do not extend to providing comprehensive legal aid and it is premature to require it other than as a recommended right.

Rules of evidence and procedure differ markedly between jurisdictions. The European Court of Human Rights has overcome the difficulties in prescribing detailed rules by setting out several principles that should apply to court proceedings in member states. Those applicable to tax proceedings include: procedural equality, an adversarial process and disclosure of evidence, a reasoned decision and effective participation.[354]

Procedural equality or 'equality of arms' requires that there should be a fair balance between the parties and each party should have a reasonable

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349 P. Baker, above n. 235, p. 243; and C. Ovey and R. White, above n. 37, p. 169.

350 *See* the discussion in R.K. Gordon, above n. 273, p. 123.

351 It has flowed from the International Covenant on Civil and Political Rights, Art. 14, and there is no suggestion in any tax case that the right to legal representation should be denied. OECD Taxpayers' Rights and Obligations, above n. 74, p. 22 provides country examples of different representation rights.

352 Discussed in the European context in D. Albregtse and H. Van Arendonk, above n. 186 and more generally in OECD, Taxpayers' Rights and Obligations, above n. 74, p. 22.

353 P. Baker, above n. 235, p. 245.

354 C. Ovey and R. White, above n. 37, pp. 155-160.

opportunity to represent their case.[355] This is particularly important in tax cases involving individual taxpayers, where the authority and resources of the revenue authority could easily intimidate a taxpayer. The tribunal or court needs to ensure that there is procedural equality and this may require intervention in the proceedings on behalf of the taxpayer. In Australia, the Administrative Appeals Tribunal takes a strongly interventionist approach in its proceedings to ensure that those least capable of presenting their case are able to do so, particularly where they are unrepresented.[356]

An adversarial process means that the parties should have full knowledge of and be able to comment on the observations filed or evidence adduced by the other party.[357] This requires the provision of full information about the issues being contested and the exchange of all relevant documentation within a reasonable time before the hearing.[358] Without such information, it is difficult for a review or appeal to be fully effective. However, there are occasions where the court or tribunal should allow non-disclosure of evidence where it might adversely affect a third party. For example, the revenue authority may have used comparable information from another taxpayer to draw a conclusion as to the veracity of information provided by the taxpayer seeking review in a transfer pricing case.[359]

Similar principles underlie the requirement for a reviewing body to provide reasons for its decision as apply to the giving of reasons for the proper exercise of administrative discretion. The taxpayer should be given the reasons for why a decision is made and the facts on which it is based. The reasons need not cover all points but should demonstrate that the reviewing body has not missed an issue fundamental to its decision.[360]

The final point relevant to a fair tax hearing is that the taxpayer must be an effective participant in the proceedings to the extent he or she is not represented and is suffering from a disability.[361] This may require the

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355 Ibid., and *see Dombo Beheer BV v. Netherlands*, Judgment of 27 October 1993, Series A, No. 274-A; (1994) 18 EHRR 213.

356 Described in detail in R.H. Woellner, S. Barkoczy, S. Murphy, and C. Evans, *Australian Taxation Law* (16th edn., Sydney, CCH, 2005), p. 1842 *et seq.* and *see* B.J. McCabe (SM) in *Case 3/2004*, 2004 ATC 119.

357 *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A, No. 262; (1993) 16 EHRR 505, discussed in C. Ovey and R. White, above n. 37, p. 156.

358 R.K. Gordon, above n. 273, pp. 106-107.

359 M. Markham, above n. 39, pp. 177-184.

360 C. Ovey and R. White, above n. 37, p. 158.

361 Ibid., p. 159.

provision of an interpreter or other special facilities for taxpayers suffering from disabilities.

There are further fairly complex issues that relate to review and appeal. Should tax be suspended pending the review or appeal? Treatment among OECD countries is inconsistent. The position varies from automatic suspension in countries such as Belgium, Finland and the US, through suspension on certain conditions in countries such as Australia, France, Greece and the UK, to no suspension in Italy and Turkey.[362] Thuronyi notes that developing and transition countries tend not to allow suspension to prevent abuse and frivolous appeals.[363] There is insufficient consistency in approach to warrant any form of right in this regard. However, it is recommended that suspension of tax should be allowed at least by application to the review body at the commencement of proceedings where there is a prima facie case and the taxpayer can show hardship.[364]

Where taxpayers are successful on appeal, their costs of undertaking the appeal should be paid.[365] Whether they should be compensated for any significant loss or damage incurred as a result of the action of the tax authority depends upon the broader legal remedies. Article 14 of the International Covenant on Civil and Political Rights and Article 3 of the 7th Protocol of the ECHR contemplate that where there has been a miscarriage of justice compensation should usually be paid. This would normally relate to criminal injury.[366]

Assume a revenue officer commits an offence and causes personal or economic loss to a taxpayer, for example, by releasing, without authorization, commercially sensitive information on a taxpayer's file, either generally, or to another taxpayer. There should be some form of remedy for the taxpayer in such instances.[367] The taxpayer would have to show loss. In common law jurisdictions, there may be actions for negligence and breach of duty of care.[368]

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362 V. Thuronyi, above n. 169, p. 218.

363 Ibid.

364 P. Baker and A.M. Groenhagen, above n. 242, p. 52.

365 Ibid., p. 51; OECD Taxpayers' Rights and Obligations, above n. 74, p. 20; and R. Manning and D.F. Windish, above n. 288, p. 83, which sets out the introduction of changes to improve the rules governing the award of costs and fees to taxpayers in the US and to allow civil damages for negligence by IRS officers.

366 H.W.R. Wade and C.F. Forsyth, above n. 2, p. 796.

367 K. Wheelwright above n. 118, p. 69, notes that in Australia, an 'act of grace' allows payments to be made to taxpayers or tax payments to be waived under the Audit Act 1901 (Cth).

368 M. McLennan, above n. 68, p. 48.

There may be a cap on compensation and taxpayers would usually have to take reasonable steps to minimize any losses.[369] However, any remedy must be carefully tailored so that the revenue authority is not restrained in its proper pursuit of tax evasion and fraud for fear of facing large damages claims in the event that it cannot prove its case.

VII. Conclusion

This chapter has set out the secondary legal and administrative rights that should be found in all tax systems, together with a number of recommended rights. It will be recalled that many of these rights can be implemented either legally or administratively depending upon the structure of the rules in a particular legal system. Their content will usually differ depending upon the means of enforcement.

The chapter begins by articulating the principles that should govern the administrative action of a revenue authority. These principles are overarching in that they cover all administrative decisions and actions. There is often overlap with specific rights, but where these provide additional protection, that protection is described in the context of those rights.

As discussed in Chapter 3, principles underlie all tax systems in some form, whether or not they are competing and quite often contradictory. The advantage of codifying these principles either legally or administratively is that it ensures that they do not then have to be 'discovered' before they can be applied. Certain jurisdictions, such as Germany, have illustrated this approach in this and other chapters. Germany has used legal codification. In countries such as Australia and the UK, where these principles are drawn from a range of statutes, the common law and administrative guidelines, the position is much less clear. This can work to the disadvantage of both the taxpayer and the revenue authority, despite the element of flexibility that comes with uncertainty.

Which approach should be used for best practice in tax administration depends upon the jurisdiction and context. However, it is easy to fudge the question of whether a jurisdiction is operating in line with best practice, by saying that the legal remedies that apply across the legal system will meet the standards set out in the Model. What is needed is a detailed review and analysis of exactly how the standards are met, by which rules, whether legal or administrative, and whether the protection provided is sufficient.

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369 Ibid.

The chapter sets out the specific rights applicable to each of the major functions of tax administration. It is encouraging that despite the variations between legal families and tax families, there is a consistent understanding of the main forms of protection that should be afforded to taxpayers. It is quite often based in an understanding in other legal areas developed in the context of human rights and the practice of international law on the one hand, and the practical implementation of economic globalisation on the other. At the functional level there is wide variation evident in the ways that individual rights are observed and implemented. This is inevitable given the completely different contexts in which tax administration operates. Nonetheless, there is a common core content that allows the clear articulation of standards of best practice in taxpayer protection.

This chapter, together with Chapters 6 and 7, flow directly into the Model set out in Chapter 9. The Model provides the best practice standards of taxpayer protection that should be found in any tax system, together with recommended rights for advanced systems. This and the earlier chapters have provided a rationale and relatively brief commentary on the meaning of these best practice standards.

CHAPTER NINE

A Model of Taxpayers' Rights[1]

I. Introduction

This Chapter provides a model of taxpayers' rights based on the analysis in Chapters 6-8. It is not designed as the basis for an international convention or instrument requiring ratification. The focus of this chapter is to provide a guide to best practice in tax administration along the lines of the OECD, *General Administrative Principles — GAP001 Principles of Good Tax Administration* and *General Administrative Principles — GAP002 Taxpayers' Rights and Obligations*.

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[1] D. Albregtse and H. van Arendonk, *Taxpayer Protection in the European Union* (The Hague, London/Boston Kluwer Law International, 1998); A. Sawyer, 'A Comparison of New Zealand Taxpayers' Rights with Selected Civil Law and Common Law Countries — Have New Zealand Taxpayers Been "Short-Changed"?' (1999) 32 *Vanderbilt Journal of Transnational Law*, 1345; P. Baker, 'Taxation and the European Convention on Human Rights' [2000] *British Tax Review*, 211; P. Baker, and A.M. Groenhagen, *The Protection of Taxpayers Rights — An International Codification* (London, European Financial Forum, 2001). Other valuable works dealing with individual rights or individual jurisdictions are footnoted. H.J. Ault, *Comparative Income Taxation* (The Hague, Kluwer Law International, 1997); S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Oxford, Hart Publishing, 2004); M. Lang (ed), *Direct Taxation: Recent ECJ Developments* (The Hague, Kluwer Law International, 2003); S. van Thiel, *EU Case Law on Income Tax* (Amsterdam, IBFD Publications, 2001).

The analysis in Chapters 6-8 provides the commentary on the model for the purposes of this book. Subsequent adoption and development of the model may see concurrent development of a more specific and agreed commentary.

As the aim is to provide a common standard of taxpayers' rights for inclusion in domestic legislation, it is unlikely that all rights in the model will be adopted as a separate code in most jurisdictions. It is only where reform of the tax system includes a new tax act that adoption of this kind will be feasible. However, elements of the model may be included as they stand into existing tax acts as a separate section.

For many jurisdictions the model will provide a standard to act as a form of quality control. Tax policy makers will be able to measure the quality of the rights afforded to taxpayers against an objective international standard. It will provide legitimacy and reassurance where policy makers are striving to achieve best practice. Domestically it will provide support for revenue authority compliance programmes. It will also assist revenue authorities and the judiciary by allowing them to assess issues brought before them comparatively, taking account of decisions on similar issues elsewhere that may helpfully be decided on a uniform basis. It is likely that commonality of problems in the administration of tax systems will increase, even if the move towards harmonisation of substantive rules is slow.

Flowing from the analysis in Chapters 6-8 and the issues of interpretation identified in Chapter 3, it is clear that the model will need adapting to the context of each jurisdiction. States will need a degree of latitude in the implementation of the individual rights. This requires the model to remain relatively broad in its articulation of rules to maintain that flexibility. That said, the value of the model will depend upon a genuine attempt to implement the rights contained in it.

As indicated in Chapter 2 the model is two-tiered. This provides developing countries, unable to comply with all rights contained in the model, the opportunity to ensure that the basic rights at least are protected in their jurisdiction. The model therefore identifies the basic rights in each article, with a list of recommended rights, which should be present in all sophisticated tax systems.

In drafting the model it is useful to note the drafting principles applicable to tax rules generally.[2] In particular, it should be understandable, which includes 'elegance, brevity and clarity of expression' but without being cryptic.[3]

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[2] *See*, for example, V. Thuronyi, 'Drafting Tax Legislation' in V. Thuronyi (ed.) vol. 1, *Tax Law Design and Drafting* (Washington DC, IMF, 1996), ch. 3.

[3] Ibid., 73.

Clarity is important given 'that considerable adaptation, if not wholesale revision, of the language of the model will likely be required in order to meet the particular needs of the country in question'.[4]

Finally, it is important to note that much of the wording and ideas of the model is drawn from a range of sources clearly identified in preceding chapters. Although it is inappropriate to produce a heavily footnoted model, it is appropriate to acknowledge that the content relies heavily on a wide range of existing sources identified in the earlier analysis and commentary.

II. Model of taxpayers' rights

A. Chapter 1: Scope and definitions

1. Article 1

This document sets out the rules governing the exercise of tax administration in the adopting state: to provide for tax law and tax administration that is certain, lawful, reasonable and procedurally fair; to promote effective and efficient administration and good governance; and to create a culture of accountability, openness and transparency in tax administration.

2. Article 2

This article shall include the definitions required in the legislation of the adopting state.

B. Chapter 2: Parliamentary protection and judicial interpretation

1. Article 3

(1) When legislation on matters affecting taxation is introduced into parliament, there shall be an accompanying statement identifying the potential

[4] Ibid., 94.

impact, if any, of the proposed legislation on existing legislated rights or on existing administrative guidelines governing taxpayers' rights.

(2) There shall be established a pre-legislative scrutiny committee to examine and report to parliament on bills affecting taxation to ensure that there is no contradiction, incompatibility or inconsistency between proposed legislation and the rights already enacted for the protection of taxpayers. The committee shall have the right to request information from the executive arm of government and from other parties at its absolute discretion. The reports of the committee shall be laid before parliament and shall be published.

(3) Any standing orders or guidelines for the drafting of legislation affecting taxation shall require consideration of the past reports of the relevant pre-legislative scrutiny committee when drafting new legislation.

2. Article 4

(1) So far as it is possible to do so, primary legislation and subordinate legislation governing the administration of taxation must be read and given effect in a way that is compatible with the rights contained in this [law].

(2) Where an appeal court is satisfied that a provision of primary or subordinate legislation is incompatible with a right contained in this [law], it may make a declaration of that incompatibility.

(3) A report containing all declarations of incompatibility shall be made annually to the Minister responsible for revenue and a copy of the report shall be laid before Parliament.

C. Chapter 3: Primary legal rights

1. Article 5

a Explanation

Primary legal rights articulate the fundamental principles on which a tax system is based and shall apply to all tax rules, whether legislative or administrative.

b Rights

2. Article 6

(1) Taxes, duties, fees and charges shall be imposed by law.

(2) Where an administrative discretion is given it shall be authorized by law.

(3) A law authorizing an administrative discretion shall provide criteria for, and limits on, its exercise where:

(a) the content and matter of the discretion is significant;
(b) the binding quality or effect is substantial; and
(c) the potential application is broad.

(4) The law shall be applied and administrative discretion shall be exercised:

(a) in a way that is appropriate and necessary to achieve the objectives legitimately pursued;
(b) so that where there is a choice between several appropriate measures recourse shall be had to the least onerous; and
(c) so that where disadvantages are caused they are not disproportionate to the aims pursued.

(5) Any exercise of discretionary powers shall be:

(a) based on reasons, which shall be applied consistently, fairly, and impartially; and
(b) the reasons given for a decision shall be intelligibly related to a framework of equally intelligible standards that can be seen fairly to fall within and be the basis of the discretionary powers; and
(c) the exercise shall be fair and reasonable in matters of procedure and substance.

3. Article 7

(1) All rules applicable in the tax system shall be compiled and published accurately and in a form that is accessible to all users.

(2) Publication of tax rules or material relating to their interpretation by a government agency shall be impartial and unbiased.

4. Article 8

(1) Tax laws, delegated legislation and administrative discretion shall not have retroactive effect except to the extent that they are:

(a) reasonable, which may include consideration of one or more of:
  (i) the limited consequences of retroactivity;
  (ii) the error, lack of clarity or contradiction they aimed to correct;
  (iii) urgent public interest;
(b) serving a legitimate purpose; and
(c) proportionate in striking a fair balance between the state and taxpayers.

(2) Where the Government announces that it intends to enact legislation that will take effect from the date of the announcement:

(a) it shall do so normally only to correct errors or anomalies, introduce concessions or to prevent tax avoidance or arbitrage;
(b) it shall provide sufficient detail in the announcement for taxpayers to order their affairs in accordance with the proposed laws;
(c) it shall provide appropriate transitional provisions if the subsequent legislation differs in substance from the announcement;
(d) it shall introduce legislation to give effect to the announcement within a reasonable time.

5. Article 9

(1) Tax rules shall be certain. If a provision is absurd, ambiguous, contradictory, or does not make sense, it shall apply to the taxpayer's benefit.

(2) If a tax provision or any part of it is so uncertain that it cannot be applied, the court or administrator responsible for its application shall not apply that provision or part of it.

(3) There shall be rules governing the interpretation of the tax rules where two or more laws contradict.

(4) Where taxpayers can show that there are genuine and reasonable circumstances that prevent them from complying with the terms of the law, the revenue authority shall have the discretion to grant appropriate relief.

a Recommended rights

(1) The revenue authority shall have responsibility for funding a test case litigation programme to resolve taxation issues that are important to the general administration of the tax system.

(2) In respect of all its litigation, the revenue authority shall:

(a) Formulate a document that sets out its litigation philosophy, approach and policy;
(b) Provide oversight of litigation by a senior officer of the revenue authority to ensure consistency in management of the programme;
(c) Apply risk management techniques to tax litigation issues;
(d) Provide for independent input into the litigation programme;
(e) Fund taxpayers' expenses in defending all cases where the revenue authority has been unsuccessful at any stage of the litigation; and
(f) Communicate the application of finalized court and tribunal decisions in a standard form.

6. Article 10

(1) Taxpayers shall pay only the amount of tax required by law.

(2) Taxpayers that overpay tax shall be entitled to a full refund or offset against other amounts owing.

(3) Except where specifically legislated, taxpayers shall pay domestic tax only once on the same components of the tax base and shall receive relief for tax already paid in the calculation of further tax on the same amount.

7. Article 11

(1) There is a presumption that the tax law shall not discriminate between taxpayers in the same position and shall allocate taxes fairly between people in different circumstances.

(2) Where the presumption is not met, in any action before it, a court shall nonetheless uphold the rule:

(a) where the treatment under the rule pursues a legitimate aim; and
(b) the means employed are proportionate to the legitimate aim.

D. Chapter 4: General powers of administration

Rights

1. Article 12

There shall be an administrative body charged with the administration of the tax system (the revenue authority). The revenue authority shall be structured and shall operate in accordance with principles of good governance. The revenue authority shall ensure compliance in all areas of its responsibility with the International Monetary Fund *Code of Good Practices on Fiscal Transparency*. The administrative application of the tax law and administrative rules shall be subject to procedural safeguards.

2. Article 13

(1) The revenue authority shall be independent in its exercise of the powers of administration, collection and enforcement from external influence, including but not limited to, other Government ministries or departments and Members of Parliament.

(2) The head of the revenue authority shall have security of tenure, which shall extend beyond a single term of the body of elected representatives, and shall be removed from office only in the event of proven misbehaviour, physical or mental incapacity, or other circumstances that compromise her or his ability to act.

(3) The revenue authority shall be accountable. In addition to its annual reports to a Government minister responsible for the revenue authority, the designated head of the revenue authority shall provide annual reports to Parliament either directly or through the relevant Government minister responsible, which shall be published.

(4) The revenue authority shall develop administrative principles designed to ensure good administrative practices that shall govern its relations with taxpayers, its employees and other revenue authorities.

(5) Provision of adequate resources to enable the revenue authority to function properly shall be a budget priority.

(6) The revenue authority shall measure its performance through a transparent process of quality assurance based on published objective measures on which it shall report annually.

(7) The revenue authority shall be subject to annual audit by a national audit body or equivalent organization, which is independent of the executive and reports to the legislature and the public on the financial integrity of the revenue authority accounts.

(8) There shall be external oversight of the revenue authority, such as a parliamentary committee, or a governing or advisory board that has the power to report to the relevant minister and, if necessary, to parliament.

(9) The revenue authority shall publish a document setting out the administrative rights and obligations of taxpayers. (A model document is included at Appendix 1.)

(10) There shall be constituted a Revenue Ombudsman or similar office to investigate, in response to a complaint by a taxpayer or other interested party, where there is no practical alternative avenue for independent review, the conduct of the revenue authority and other government departments or public authorities responsible directly or indirectly for the administration of the taxation system.

(11) There shall be constituted a dispute resolution system designed to provide an informal mechanism for early resolution of disputes arising between taxpayers and the revenue authority. The system shall be based on the principles set out in ISO 10002:2004, the International Organization for Standardization *Quality management — Customer satisfaction — Guidelines for complaints handling in organizations* (as amended or updated from time to time) and shall incorporate the following elements:[5]

(a) Prevent unnecessary conflict through notification, consultation and feedback.
(b) Create ways of reconciling the interests of those in dispute.
(c) Build in 'loop-backs' to negotiation.
(d) Provide low-cost alternatives where negotiation fails.
(e) Create sequential procedures moving from low-cost to high-cost.
(f) Provide the necessary motivation, skills and resources to allow the system to work.
(g) Provide effective mechanisms for measuring qualitative success.
(h) Provide mechanisms for monitoring, review and continuous improvement both at individual and systemic levels.

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[5] Adapted from W.L. Ury, J.M. Brett and S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (Cambridge, MA, Program on Negotiation Books, 1993), ch. 3. Explained fully in Chapter 5, 'Enforcement'.

3. Article 14

(1) The revenue authority shall establish a systematic approach to decision-making to ensure consistent, transparent, fair and impartial decisions can be made across the organisation at all levels. The system shall include but is not restricted to:

(a) The establishment of policies and procedures governing decision-making and the exercise of discretion;
(b) The development of internal manuals, check-lists and other aids;
(c) A clear policy governing escalation of decisions and procedures for checking and review;
(d) The development and implementation of quality assurance measures; and
(e) Regular review of the system with procedures to implement necessary changes.

(2) Whenever a taxpayer is entitled to a decision or action by the revenue authority, it shall occur either within a specified period or within a reasonable time.

(3) Whenever a taxpayer is required to do something, provide information, or otherwise assist the revenue authority, it shall be after the giving of reasonable notice, unless it is clear that such notice would reasonably impact on the success of the relevant administrative action.

(4) To give effect to procedurally fair administrative action, except where specific provision is made otherwise, revenue officers shall provide:

(a) adequate notice of the nature and purpose of proposed administrative action;
(b) a reasonable opportunity to make representations;
(c) a clear statement of the administrative action;
(d) adequate notice of any right of review or internal appeal, where applicable; and
(e) adequate notice of the right to request reasons.

(5) Tax administration shall be conducted in accordance with the general principles that:

(a) There shall be publication and dissemination of a wide range of information in an appropriate form to assist taxpayers in understanding and complying with their full range of obligations; and

(b) There shall be a specific programme of community education to develop and reinforce an understanding of the importance to the community of the tax system and compliance with the obligations imposed by it.

(6) There shall be provision made by the revenue authority to assist taxpayers in understanding and complying with their full range of obligations, including additional assistance for those with special requirements or needs, such as speakers of foreign languages, taxpayers with disabilities, ethnic minorities, and taxpayers living in remote areas.

(7) Revenue officers shall act ethically and professionally in the discharge of their duties in accordance with clear and well publicised standards of behaviour.

(8) Revenue officers shall not draw an adverse inference when a taxpayer chooses to exercise available legal or administrative rights.

a Recommended rights

(1) Individual taxpayers should have the right to judicial review of the application of rules that do not fall within designated exceptions on the basis of general principle.

(2) It shall be an offence for any person outside the revenue authority to interfere with an audit or an investigation of a taxpayer by the revenue authority. The offence shall include a request to commence or terminate an audit or investigation. Any revenue officer approached by a third party with a request that might reasonably be construed to fall within the offence, shall report the matter immediately to her or his superior.

E. Chapter 5: Information gathering

1. Article 15

a Explanation

Officers of the revenue authority shall be subject to secrecy provisions. The content and extent of the secrecy provisions shall be articulated for the protection of both revenue officers and taxpayers. They shall include rules governing the collection, storage, security, access to, correction of, use and

disclosure of information provided. They shall extend to third parties working for or contracted to the revenue authority.

2. Article 16

a Rights

(1) Taxpayer information shall be treated as completely confidential.

(a) Taxpayer information shall be used only for the assessment, enforcement and collection of tax, and for social security purposes.
(b) There shall be clear rules governing the disclosure of taxpayer information to other government departments, other taxpayers and third parties and the duties and responsibilities of those persons in relation to the taxpayer information.
(c) Officers of a revenue authority shall access taxpayer information only when required to do so in the performance of their duties.
(d) Unauthorized access to taxpayer information held by the revenue authority by any person, unauthorized browsing of such information and any unauthorized release of such information to a third party shall be an offence. Where the person is not a revenue officer, that person shall be personally liable, and when that person is acting for or on behalf of a company or organisation, that company or organisation shall also bear liability.
(e) Revenue officers, by virtue of their position, shall be personally liable for any misuse of information.
(f) Taxpayers shall have the right of access to information held about them by the revenue authority and the ability to correct that information except in limited circumstances, including:
    (i) where release of the information would prejudice third parties, or
    (ii) where release of the information would prejudice an ongoing investigation.

(2) The duty by a third party to report information for any purposes under the tax law shall be legislated:

(a) Where a third party wilfully provides fraudulent information about a taxpayer this shall constitute an offence; and

(b) The taxpayer may bring a civil action for damages or compensation.

(3) Information required by the revenue authority shall be restricted to that information relevant to the tax affairs of a taxpayer except to the extent that the revenue authority is required by law to perform other functions requiring additional information.

(4) Information exchange and mutual assistance agreements shall provide equivalent protection to that set out in Article 21 and Article 22 of the *Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters* with the meaning given to each Article as set out in the *Commentary on the provisions of the Convention*.

(5) Exchanges of information and mutual administrative assistance in tax matters shall require approval by the most senior levels of the revenue authority.

(a) There shall be clear procedures and guidelines for all exchanges of information and mutual administrative assistance, which shall include the identification of the characteristics of matters of particular sensitivity or importance so that they can be escalated automatically for approval at higher levels of authority.
(b) Exchange of information or mutual administrative assistance relating to a taxpayer shall be foreseeably relevant to the determination, assessment and collection of taxes covered by the relevant agreement, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters.[6]
(c) The approval procedures for an exchange of information or mutual administrative assistance shall set out clearly the information or action required by the revenue authority before a decision can be made.
(d) The revenue authority shall either adopt the *OECD Manual on the Implementation of Exchange of Information Provisions for Tax Purposes* or develop guidelines that provide procedures to ensure equivalent taxpayer protection.
(e) There shall be regular audits and reviews of information exchange, particularly automatic and spontaneous exchanges of information to ensure compliance with procedures and guidelines.

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[6] Taken largely from the 2002 OECD Model Agreement on Exchange of Information on Tax Matters, Art. 1, <www.oecd.org>, 1 November 2006.

b Recommended rights

(1) Before contacting any person other than the taxpayer to request additional information beyond that reported by law, the taxpayer shall be given reasonable notice prior to the contact, so that the taxpayer has an opportunity to provide the information required. This requirement shall not apply if a revenue officer has reasonable grounds to suspect that prior notification would result in the taxpayer obstructing the investigation, sets out those grounds in writing, and obtains approval from a senior revenue officer.

(2) In matters involving trade, business, industrial, commercial or professional secrets or trade processes, where there is a request by another state under an exchange of information agreement for information that might affect such secrets or processes, the revenue authority shall notify the taxpayer before the information is given, to allow the taxpayer to make application, within a specified time, for the information not to be provided.

F. Chapter 6: Audit and investigation

1. Article 17

a Explanation

The revenue authority shall have the legal power to conduct wide-ranging audits and investigations, including powers of search and seizure, to ensure compliance with the tax law, but in doing so shall provide taxpayers with the protection set out in this Chapter.

2. Article 18

a Rights

3. Audit

(1) The revenue authority shall have a clear set of guidelines for its staff, setting out procedures to ensure consistent application of delegated authority, standards developed for audits, audit policies, audit procedures,

and how and by whom interpretation of the law applicable to the audit will be carried out.

(a) Audit policies and procedures shall be based on principles of accuracy, efficiency, fairness, objectivity, transparency, completeness, consistency and defensibility.[7]
(b) There shall be separate guidelines for revenue authority activities specifically authorized by law, to ensure that the legal requirements are met.
(c) Audit guidelines shall provide for conflict of interest.

(2) Taxpayers shall be given prior notification of an audit or a request to attend an interview, with brief details of the expected nature, scope and duration of the audit or interview, the information and records that will be required, and the names and contact details of the revenue officers managing the audit or interview.

(3) Taxpayers shall be given the opportunity to request postponement of the audit or interview if they have good reasons.

(4) Revenue officers shall always clearly identify themselves.

(5) The audit or interview process and timeframe shall be explained in detail to the taxpayer or its representatives before an audit or interview commences, with the opportunity for discussion and clarification, including:

(a) Any benefits of voluntary disclosure;
(b) The rights and duties of the taxpayer during an audit or interview;
(c) The settlement practices of the revenue authority; and
(d) The avenues for objection and appeal against assessments arising out of the audit.

(6) Taxpayers shall be advised of their right to have professional representation during an audit or interview.

(7) Audits shall not interfere unreasonably with the proper running of a taxpayer's business or cause it to suffer commercial loss as a direct result of the audit activity.

(a) Meetings or interviews shall take place, where possible, at mutually convenient times.

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[7] OECD, *Strengthening Tax Audit Capabilities: General Principles and Approaches* (Paris, Centre for Tax Policy and Administration, 2006), p. 33.

(b) Audits shall usually take place in normal business hours unless otherwise agreed.

(8) Taxpayers shall be given a reasonable time to collect information required unless search and seizure powers are exercised because the integrity or existence of documents is at risk.[8]

(9) Taxpayers shall have the right to take notes of any conversations or interviews.[9]

(10) Taxpayers shall have the right to request the recording of all interviews and be given a copy of the recording at the conclusion of the interview.[10]

(11) During the audit the taxpayer shall be given the opportunity to discuss matters arising in the audit with the tax auditor:

(a) There shall be discussion of the final issues arising out of the audit that will affect any assessment raised as a result of the audit, including disputed facts and their legal consequences;
(b) Reasons shall be given for adjustments, and opportunity shall be given for the taxpayer to explain the circumstances that might justify a reduction of penalties or interest;[11] and
(c) The outcome shall be documented and provided to the taxpayer in writing within a reasonable time, together with information concerning any rights of review and remedies that may be available to the taxpayer.

(12) Negotiations shall take place to settle the outcome of the audit where these are permitted by law:

(a) Negotiations shall take place in the context of proper, fair and consistently applied settlement processes; and
(b) The terms of any settlement agreement shall be documented and the taxpayer provided with a copy.

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8 ATO, Taxpayers' Charter: Explanatory Booklet 10, *If you're subject to enquiry or audit*, p. 5, <www.ato.gov.au>, 1 November 2006.
9 Ibid.
10 Ibid.
11 Ibid., p. 7.

(13) Taxpayers shall be advised as early as possible of an intention to seek prosecution as a result of an audit or interview.

4. Search and seizure

(14) Where the revenue authority has a reasonable belief that for any purpose related to the administration or enforcement of the tax law it is necessary to gain access to premises for the purpose of searching those premises and/or seizing documents or other property or information:

(a) a warrant provided at the discretion of a judicial officer is required if the access is to a private dwelling, which discretion shall be exercised in light of Article 6;
(b) a warrant provided at the discretion of a judicial officer is required for any criminal investigation;
(c) the decision to gain access in circumstances where no warrant is required will be carried out in light of Article 6; and
(d) all powers related to access shall be used for their proper purpose.

(15) In conducting authorized searches, revenue authorities shall:

(a) normally inform the occupant before the search takes place unless this could reasonably be expected to defeat the purpose of the investigation;
(b) normally conduct searches in business hours or by appointment;
(c) normally permit the taxpayer or occupier to attend the search together with a representative;
(d) always provide the opportunity to claim privilege on documents or information;
(e) always provide a detailed receipt for anything taken, with an indication of when it will be returned;
(f) normally take a copy of documents or information rather than the original unless the original is critical to the investigation;
(g) where the original document or information is seized, normally give the opportunity to copy the document or information before it is removed; and
(h) publish guidelines on how access powers involving access to premises, searches and seizure of information will take place, together with details of the rights and obligations of taxpayers.

5. Representation and privilege

(16) In tax matters, taxpayers shall have the right to representation, be advised of that right and given the opportunity to exercise it.

(17) The law shall protect confidential communications between a lawyer and client, confidential communications between a lawyer and third parties when they are made for the benefit of a client, and confidential material that records the work of a lawyer carried out for the benefit of a client unless the client has consented to the disclosure.[12]

a Recommended rights

(1) The revenue authority shall not conduct an audit on a non-business taxpayer for two years in a row where no additional taxes were payable after the first audit.

(2) The protection afforded to confidential communications in the relationship between a lawyer and client shall extend to similar confidential communications in the relationship between a tax practitioner and client.

(3) Information obtained in a tax investigation from a taxpayer shall not be used to incriminate the taxpayer in a subsequent criminal or civil proceeding arising from which criminal or civil penalties might apply.

G. Chapter 7: Assessment

1. Article 19

a Explanation

The assessment process determines the amount of tax that taxpayers must legally pay. It is fundamental to the effective operation of the tax system. The following rights are designed to enhance voluntary compliance while maintaining the integrity of the tax system.

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[12] McHugh J. in the Australian High Court in *Commissioner for Australian Federal Police v. Propend Finance Pty Ltd* (1997) 188 CLR 501, p. 550.

2. Article 20

a Rights

(1) Revenue authorities shall provide advance rulings on how they will treat transactions or arrangements.

(2) Advance rulings shall be consistent in their interpretation and application of the tax rules both between taxpayers and to the same taxpayer over time.

(3) Where the revenue authority holds out a particular interpretation of the law to be correct, or follows specific procedures in implementing the law, and the taxpayer relies in good faith on the view of the revenue authority, the revenue authority shall be bound by its approach.

(4) An obligation to withhold tax shall be required only by legislation, which shall provide for the obligation and procedures for withholding and payment of the amount to the revenue authority.

(5) The revenue authority shall publish clear guidelines with reasonable timelines for any administrative process imposing an obligation on any person to pay or withhold tax, or to report information.

(6) Where information provided by someone other than the taxpayer is used in making an assessment, the taxpayer shall have the right to make sure the information provided is accurate.

(7) There shall be sufficient information given to a taxpayer on or with an assessment, so that the taxpayer can make an informed decision as to the accuracy of the assessment made.

(8) Where the revenue authority discovers within the relevant time limits that a taxpayer has failed to make a claim for any form of tax relief, deductions or refunds to which the taxpayer is entitled, the revenue authority shall amend the taxpayer's assessment to grant those entitlements.

(9) The revenue authority shall automatically refund overpayments of tax.

(10) Interest shall be paid on overpayments of tax.

(11) There shall be set time limits for the amendment of assessments except in cases of fraud or evasion.

(12) Time limits for the amendment of assessments shall coincide with the requirement for taxpayers to retain records.

(13) The revenue authority shall identify and publicise in advance the procedures it will follow when assessing taxpayers where there is insufficient information to make a normal assessment.

b Recommended rights

(1) Advance rulings shall be legally binding on a revenue authority.
(2) There shall be a right of appeal against an adverse binding ruling.

H. Chapter 8: Sanctions and enforced collection

1. Article 21

a Explanation

Sanctions and enforced collection are designed to reinforce the integrity of the tax system where voluntary compliance has failed. Clear procedural safeguards ensure that taxpayers' rights are protected in the face of legal and administrative action taken by the state to protect the revenue.

2. Article 22

a Rights

(1) There shall be a clear basis for the imposition of penalties and interest.

(a) Where there is discretion as to the level of penalties and interest, it shall be made clear how and why the discretion is exercised.
(b) In the exercise of discretion the principle of proportionality requires that a penalty should be proportionate to the offence.

(2) Criminal penalties shall be imposed in accordance with procedures applicable to other crimes of the same kind.

(a) The revenue authority shall set out the criteria it uses in deciding whether to recommend prosecution of a taxpayer.

(3) There shall be a clear basis for any decision to pursue collection through enforcement.

(a) Tax collection and enforcement procedures shall be documented clearly and simply, and provided to taxpayers affected.
(b) Taxpayers shall be given appropriate notice, and reasonable time to comply with demands for payment before enforcement measures are taken. All such notices shall include details of the taxpayer's rights and obligations in relation to enforcement, including the right to representation and the availability of legal aid.
(c) Where there is discretion to pursue collection through enforcement, it shall be made clear how and why the discretion is exercised.
(d) In the exercise of discretion the principle of proportionality requires that the means of enforcement should be proportionate to the tax payable.
(e) The revenue authority shall provide clear guidelines governing its exercise of enforcement powers.
(f) The revenue authority guidelines shall cover, in particular, how it will exercise its discretion to grant extensions of time to pay and to formulate tax payment arrangements. The onus of proving hardship in such cases must be reasonable.
(g) Agreements that allow a taxpayer to use payment methods that differ from normal collection requirements, such as instalment payments, shall be binding on the revenue authority. There shall be clear guidelines governing the operation of these methods.
(h) The revenue authority shall institute clear lines of authorization for enforcement of tax debts and appropriate monitoring mechanisms.
(i) Children and those with disabilities shall be protected by law during enforcement proceedings.
(j) Release of restrictions over an asset once a debt is paid or other arrangements are made with the revenue authority, shall be effected within a specified time or compensation will be payable.

b Recommended rights

(1) Remission of penalties shall allow account to be taken of exceptional circumstances relevant to the taxpayer.

(2) There shall be clear and transparent guidelines governing waiver of penalties.

(3) There shall be a collection due process hearing by a tribunal or a court at the request of a taxpayer before enforcement proceedings commence.

I. Chapter 9: Objection and appeal

1. Article 23

a Explanation

This chapter sets out the basic rights and procedures that flow from the fundamental right of every taxpayer to object to and appeal against decisions and actions of the revenue authority. In doing so it acknowledges the limits applicable to taxpayers in certain situations in exercising these rights. It is important to note that protection for taxpayers in criminal proceedings is found in the laws governing criminal law and procedure.

2. Article 24

a Rights

(1) Taxpayers shall have the right to object to assessments and to appeal to a court or administrative tribunal of independent status within a reasonable time.

(2) Any time limits on the right of appeal shall be reasonable.

(3) The right of appeal shall apply to all decisions and actions of the revenue authority except where this is specifically excluded.

(4) Taxpayers shall be informed clearly and have easy access to information about their rights of objection and appeal together with any time limits that apply.

(5) The conduct of the appeal should be subject to due process and a fair hearing, which shall include:

(a) An impartial hearing.
(b) A public hearing at one level of appeal, which may be waived on application by the taxpayer at the discretion of the court or tribunal.
(c) The right to representation.
(d) Procedural equality between the parties to the proceedings.
(e) An adversarial process with full disclosure of evidence, unless the court or tribunal specifically allows non-disclosure.
(f) The provision of reasons for a decision.
(g) The provision of facilities for taxpayers suffering from disabilities or other impediment to their effective participation.

(6) Where a taxpayer's appeal is successful, the revenue authority shall pay the taxpayer's appeal costs.

b Recommended rights

(1) There shall be a specialised tax court or tribunal at the first level of appeal.

(2) There shall be access to legal aid for those otherwise unable to appeal against a tax decision.

(3) There shall be suspension of tax payable during a review, on application to the review body at the commencement of proceedings, where the taxpayer has a prima facie case and can demonstrate hardship.

(4) Where a taxpayer suffers personal or economic loss as a direct result of the action of the revenue authority or its officers, the revenue authority shall be liable to pay compensation.

J. Chapter 10: A statement of goals

1. Article 25

The revenue authority shall publish a statement of administrative goals that will provide service standards for its dealings with taxpayers. Each goal will be supported by a performance indicator or other objective benchmark by which to measure performance against that goal. In its annual report to the minister the revenue authority will provide an analysis of its performance on each measure with an explanation for significant variances.

K. Appendix

Principles of Good Practice and an Example Administrative Charter

Whether in a charter or similar document, revenue authorities should adopt the following principles generally accepted as principles of good practice for revenue authorities:

1. Act professionally in all dealings with taxpayers.
2. Treat taxpayers with courtesy, consideration and sensitivity.

3. Listen to taxpayers' concerns.
4. Consult with key stakeholders or their representatives before significant changes are introduced.
5. Take account of a taxpayer's particular circumstances, especially individual, cultural and special needs, to the extent allowed by law.
6. Treat taxpayers as being honest in their tax affairs unless they act otherwise.
7. Minimize the costs of complying with tax obligations.
8. Provide assistance to taxpayers to help them understand and meet their tax obligations.
9. Make sure publications and other communications are clear, accurate, helpful and easy to understand.
10. Keep looking for new and better ways to give taxpayers advice and information.
11. Conduct general education programmes for both existing and potential taxpayers.
12. Provide taxpayers with easy access to and identification of contact details.
13. Be accessible and attend to enquirers, whether by telephone, mail or in person, within specified times designed to minimize delay.
14. Deal with urgent requests without delay, whether by telephone, mail or in person.
15. Answer telephone calls promptly and without unnecessary transfer.
16. Make an effort to ensure the taxpayer is put in touch with the appropriate person the first time.
17. Try to get all aspects of interaction with taxpayers right first time by making best use of all of the information available.
18. Follow through on what they say they will do.
19. Ensure that their staff are well trained, competent and up-to-date with changes in the law that affect their roles.
20. Strive to provide quality service across the organisation.
21. Apologize for errors, fix them quickly and explain what went wrong and why.
22. Make it clear that taxpayers can question the information, advice and service they are given and inform them of options available for resolving disagreements.
23. Monitor its performance in living these principles through collection of information and regular surveys, which are made public and used internally for continual improvement.

The OECD Centre for Tax Policy and Administration has prepared an example taxpayers' charter: *General Administrative Principles — GAP002 Taxpayers' Rights and Obligations*.

Example Taxpayers' Charter using the Basic Rights and Obligations in this Note

Note: This is only an example using elements that might be found in a taxpayers' charter. It would need to be tailored to reflect the relevant policy and legislative environment, administrative practices and culture of a tax administration seeking to use it.

The Taxpayers' Charter

Introduction

In our society our tax laws requires that we pay taxes and other charges in order to fund a range of government programmes and community services, such as education, welfare, health, defence, law enforcement and transportation infrastructure, that help our society to function.

Your tax administration, in collecting these taxes and charges, operates on the fundamental principle that citizens and non resident taxpayers will act in accordance with the law when they are treated with respect and fairness and provided with all the information, advice, assistance and other services they need to comply with their obligations.

This Taxpayer Charter broadly summarises your important rights and obligations under the tax system. We have published it to help set in place the co-operative relationship we seek with the community — one based on mutual trust and respect.

Your rights:

Your right to be informed, assisted and heard

We will treat you with courtesy and consideration at all times and will, in normal circumstances, strive to:

- help you to understand and meet your tax obligations;
- explain to you the reasons for decisions made by us concerning your affairs;

- finalize refund requests [within . . . days]/[as quickly as possible][13] and, where the law allows, pay you interest on the amount;
- reply to written enquiries [within . . . days]/[as quickly as possible];[14]
- deal with urgent requests as quickly as possible;
- answer your telephone call promptly and without unnecessary transfer;
- return your telephone call as quickly as possible;
- keep your costs in complying with the law to a minimum;
- give you the opportunity to have your certified legal or taxation adviser present during any investigation;
- Send you, by the end of the investigation or [within . . . days of]/[as quickly as possible after][15] its completion, the relevant minutes or a written advice of the result of that investigation and the reasons for the decisions we have taken;
- Send you, where an assessment has been issued, details of how the assessment was calculated.

Your right of appeal

We will, in normal circumstances, strive to:

- fully explain your rights of review, objection and appeal if you are unsure of them or need clarification;
- review your case if you believe that we have misinterpreted the facts, applied the law incorrectly or not handled your affairs properly;
- ensure that the review is completed in a comprehensive, professional and impartial manner by a representative who has not been involved in the original decision;
- determine your objection [within . . . days]/[as quickly as possible][16] unless we require more information to do so, or the issues are unusually complex;

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13 Note: Jurisdictions having explicit taxpayer service time benchmarks may wish to insert their relevant time standard at this point, other Jurisdictions may prefer to use 'as quickly as possible' or 'in a reasonable time'.

14 Ibid.

15 Ibid.

16 Ibid.

- give you reasons if your objection has been completely or partially disallowed;
- request further information from you only where it is necessary to resolve the issues in dispute.

Your right to pay no more than the correct amount of tax

We will:

- act with integrity and impartiality in all our dealings with you, so that you pay only the tax legally due and that all credits, benefits, refunds and other entitlements are properly applied.

Your right to certainty

We will, in normal circumstances, strive to:

- provide you with advice about the tax implications of your actions;
- let you know [at least . . . days]/[as soon as possible][17] before the conduct of an interview or a request for the production of documents;
- advise you of the scope of an interview and our requirements;
- arrange a suitable time and place for the interview and allow you time to prepare your records.

Your right to privacy

We will:

- only make enquiries about you when required to check that you have complied with your tax obligations;
- only seek access to information relevant to our enquiries;
- treat any information obtained, received or held by us as private.

Your right to confidentiality and secrecy

We will:

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17 Ibid.

- not use or divulge any personal or financial information about you unless you have authorized us in writing to do so or in situations where permitted by law;
- only permit those employees within the administration who are authorized by law and require your personal or financial information to administer our programmes and legislation, to access your information.

And your obligations

Your obligation to be honest

We expect you to:

- provide complete and accurate information as and when required;
- declare all your assessable income in your income tax return;
- claim only deductions, rebates and credits to which your are entitled;
- answer questions completely, accurately and honestly;
- explain the full facts and circumstances when you seek tax advice or when you request a private ruling.

Your obligation to be co-operative

We expect you to:

- co-operate with tax administrators and treat them with courtesy, consideration and respect, as we do in our dealings with you.

Your obligation to provide accurate information and documents on time

We expect you to:

- file correct returns and documents within time limits specified;
- provide complete and accurate information by certain dates;
- take reasonable care in preparing your tax returns, documents and information;
- inform us of relevant events such as incorporation, opening a business, correspondence address changes, moving the place of business, ceasing

business, with required taxpayer identifiers in a timely manner so that we can administer tax legislation properly, efficiently and effectively.

Your obligation to keep records

We expect you to:

- keep sufficient records and books to enable you to meet your tax obligations;
- keep sufficient records and books for the required retention period;
- take reasonable care in preparing your records and books;
- allow us access to records and books so that we can check your tax obligations.

Your obligation to pay taxes on time

We expect you to:

- pay the full amount of your taxes by the due dates;
- pay the full amount of any balance outstanding resulting from assessment or reassessment;
- help us develop a mutually acceptable payment arrangement if you cannot pay any outstanding balance in full and have exhausted all reasonable possibilities of obtaining the necessary funds by borrowing or re-arranging your financial affairs;
- withhold and remit by due dates all taxes withheld or collected on behalf of others;
- advise us as soon as practical if some event beyond your control has affected your ability to pay your taxes on time so that appropriate arrangements can be put into place to assist you.

Risks of non-compliance with the obligations

If you do not meet your tax obligations

- the law may provide for penalties and / or interest to be imposed;
- prosecution action may be taken in more serious cases.

CHAPTER TEN

Conclusion

I. Drawing the Threads

Taxation is not a fundamental good in itself. Rather it is a limit on property rights, as it requires a contribution of property from taxpayers to fund the operation of the state. The role of taxpayers' rights is in turn to provide limits on the taxing powers of the state. Discovering the content of those limits on taxing power formed much of the substance of the book as it sought to define enforceable rights and the mechanisms for their enforcement.

The argument that there are no universally accepted standards from a subjective and relativistic perspective is overcome through the human rights literature, which recognises that some human rights are universally accepted and applicable. That tax systems are so diverse also does not present an impediment to the discovery of acceptable standards of best practice in taxation law. Rather it suggests that for developing countries a lower benchmark is required. A two-tier Model of this kind has some disadvantages. States may adopt only the basic level of rights. States may not want to acknowledge that they are adopting only the basic level and therefore not adopt it at all. A single standard is also clearer and easier to adopt. However, the advantages of a two-tier Model seem stronger. A two-tier model is already in use in other areas of tax administration. Different levels of protection provide a platform to further the existing dialogue between tax administrations as they explore ways to improve protection in developing countries. The reality of the international environment reflects these different levels of protection. The higher levels provide a benchmark for states to strive towards. The greater the level of protection afforded to taxpayers, the more attraction there is for foreign investment.

A Model is not only feasible — it is also realistic. States are increasingly accepting rights as limits on their sovereignty both domestically and internationally. A Model sets out the rights that have general acceptance. To extend this to include obligations expands it to constitute a Model tax code. Instead, the Model should focus on providing a benchmark for best practice in the provision of taxpayers' rights, for which there is a current need. The basis for the rights chosen should be general acceptance and conformity to accepted general principles of law and practice. The incentive for states to adopt the Model is to improve voluntary compliance, enhance revenue collection, and improve the perception by taxpayers that their system is fair. A Model is realistic, timely and beneficial in the current international policy environment.

A wide range of major reports has examined the reform of tax systems. Although they have used common terminology, the content of the principles they adopt differs and it is important to identify a common core of accepted definition and meaning. The principles can then be used beneficially to provide support for the inclusion of rights in the Model. Even so, there will be difficulties that could arise in interpreting the rights contained in the Model based on an analysis of current international experience. However, an understanding of the underlying principles in the context of divergent legal systems provides a strong foundation for the development of common standards.

Such standards are in increasing demand as government recognises the need for best practice across all areas of its operation. Government is expanding as society becomes more complex and regulation struggles to cope with development and innovation. Tax administration is no exception. Growth and complexity is balanced by an increasing awareness both among tax administrators, researchers and taxpayer representatives that there is much benefit in continuous improvement of tax administration. There has been an increase in many jurisdictions in legal and administrative protection generally, which has provided a firm basis for developing a comprehensive and complementary framework for the protection of taxpayers' rights.

Fundamental to the protection of taxpayers' rights is an understanding of their nature and how they should be classified. Their classification is in turn dependent upon whether the right is enforced legally or administratively. It is only where it is clear exactly what right is meant and how it is to be enforced, that the content of the right can be understood. There is no point including rights in a Model without defining why they are there. An analysis of rights draws together legal, administrative, international and domestic threads from a range of sources, recognising the nuances in classification that are essential in the creation of an effective Model.

Enforcement of taxpayers' rights is a little explored area and yet foundational for understanding their nature. The variety of ways that rights can be enforced has to be balanced by what is practical. Nonetheless, there is significant scope for taking a much stronger approach in the legislation of taxpayers' rights to give them more force and effect. This does not need to extend to entrenchment or other complex mechanisms, when simple use of mechanisms already in place, such as scrutiny committees, potentially would have a significant and beneficial impact on the legal framework for tax administration.

One of the most effective forms of enforcement is only slowly finding broader acceptance in tax administration. Alternative and informal dispute resolution mechanisms can significantly increase the positive engagement of taxpayers with tax administrators. Many disputes can be resolved quickly and effectively keeping costs low. Effective dispute design using a combination of internal and low-cost external mechanisms, such as the office of ombudsman, can provide a useful means to improve voluntary compliance. The method of enforcement in its particular context is critical to the scope, content and effectiveness of a right.

As the classification of taxpayers' rights indicates, they are wide ranging and shape both the tax system and its administration. Primary legislative rights are often ignored in the analysis of taxpayers' rights: the influence of trade law, constitutional law and the broader administrative and civil law are taken for granted. For too long legislators, policy-makers and tax specialists have abstracted taxation from the normal operation of the legal system. The reality is that there needs to be much closer analysis of the impact of the broader legislative framework on taxation. Only in this way can the inter-relationship operate effectively to safeguard both taxpayers' rights and the robustness of the tax system in the context of the proper operation of the rule of law.

In many jurisdictions it remains unrecognised that effective tax administration operating under the rule of law is one of the most useful safeguards of government of any stripe. It is through taxation that governments usually most often touch the people they rule. If taxpayers' experiences of that interaction are flavoured with a sense of fairness, transparency, efficiency and effectiveness, it surely shapes their view of government as a whole. Revenue authorities are one of the most important ambassadors for effective government and deserve the support, resources and infrastructure to provide the best possible representation. Where revenue officers are underpaid, under-trained and under-resourced, it leaves the door wide open for corruption to enter and take hold.

This stands in stark contrast to those revenue authorities resourced to establish the highest standards of professionalism in an open and highly

accountable administration. It is these revenue authorities that not only regularly meet clearly established targets to fund the governments they serve, but also lead other areas of the civil service in customer service, meeting key performance indicators and providing innovative ways to perform their role. The opprobrium heaped upon tax collectors throughout history is a thing of the past in many modern revenue administrations. The cultural shift has often been hard fought but has produced jurisdictions in which most taxpayers are very comfortable approaching revenue officers because they believe they are treated fairly, politely and helpfully. As is often the case, the favourable taxpayer response belies the significant resources and years of change management that have gone into producing this result. However, as the earlier chapters have shown, a strong framework of primary and secondary administrative rights, combined with principles of good practice, provide the basis for a good working relationship between revenue officer and taxpayer.

Nonetheless, even in the most effective tax administrations, there is a danger that the relationship between revenue administration and taxpayer could be undermined over time by the lack of attention by governments. Tax law is voluminous and requires regular amendment. It is important that governments pay attention to the many minor issues raised by taxpayer representative groups and revenue administrations that need correction. So much time is often taken up with big picture policy analysis and change that the detail of technical correction and minor reform of the legal operation of the law is lost in legislative programmes. This results in less than satisfactory administrative solutions that blur the boundaries between the proper exercise of legislative and administrative power. Over time, unless the legislative timetable makes room for necessary minor amendments, the status quo can threaten the effective administration of the tax law. The excuse that tax administration is solely the province of the revenue authority, once the legal framework is in place, undermines the practical implementation of the separation of powers. It also poses a grave threat to the wider protection of taxpayers' rights. Protection of taxpayers' rights requires attention to both legislative and administrative rights and their interaction and support for one another. This in turn supports the broader administration of the tax system.

The role, structure and accountability of revenue authorities is commonly analysed in the context of management and compliance theories. A legal analysis provides support for principles of good governance essential to the effective administration of a tax system. It reinforces the importance of principles of good practice, including service standards, performance indicators and elements of charters of taxpayers' rights. They provide the practical administrative framework necessary for the protection of taxpayers' rights

and have found increasing international acceptance as essential elements of best practice in tax administration.

Although secondary legislative rights and primary and secondary administrative rights vary between jurisdiction, the analysis shows that in these too, there are internationally accepted standards of best practice. Like primary legal rights they are founded in the legal theory but often find meaning from principles drawn from related disciplines. Where there may be wide variation in law and practice in the detailed implementation of law and procedure, there is nonetheless a common core content. These rights comprise the protection fundamental to the operation of an effective tax system. Without them arbitrariness, inequity, uncertainty and irrationality can creep swiftly into the administration.

The whole comprises a Model of taxpayers' rights. Not all jurisdictions will be able to implement all of the rights it contains. However, the exclusion of a right should be well considered and clearly justified, for it is a departure from a widely accepted norm. Failure to consider the rights of taxpayers and whether and how they should be implemented is usually a sign of immaturity in a tax system. Often it is a defensive approach aligned to a failure to consider the implementation of principles of good governance, good practice, openness and accountability. However, some mature tax systems may choose to ignore taxpayers' rights. That is perhaps symptomatic of the arrogance and atrophy that sometimes accompanies aged administrations, which have misunderstood the importance of accountability inherent in the rule of law.

Most revenue administrations are working hard to implement best practice that includes the adoption of taxpayers' rights. Failure is often due not so much to a lack of will, but to broader administrative issues affecting governance, the provision of adequate staffing, training and resources, and the patchy operation of the rule of law. This book will have succeeded in much of its purpose if it provides some guidance to revenue administrators striving to overcome such significant hurdles.

II. Implications

The book provides a theory of taxpayers' rights grounded in general legal and rights theory. It is a relatively new field of tax law. It requires development and will change as it matures through discussion, analysis and refinement. However, this book aims to contribute some early steps along this path.

Chapter 3, in particular refines the definition and application of generally accepted principles that underlie tax systems, building on earlier work by Alley

and the author. The common definition can be applied in all areas of tax administration.

Again building on earlier work by the author, Chapter 4 provides a classification of taxpayers' rights linked to its method of enforcement. The developments in this book aim to provide the framework for wider analysis of taxpayers' rights.

Consideration of legislative enforcement is of particular significance in the formulation of the legislative frameworks for developing tax systems. It is when the rules governing major reform are set in place that it is possible to provide for the legislative and other mechanisms that can make a significant improvement to the effective operation of a tax system. In mature systems, it is often too difficult and too late. However, rules and mechanisms introduced as part of an intended design are more efficient than surrogate measures that provide convoluted routes to the same end.

For all tax systems, dispute system design within the tax administration is becoming critical to the successful engagement of taxpayers with the system. Other areas of law have shown the clear benefits of providing a wide range of dispute system mechanisms. Some tax administrations have proved the success of alternative dispute resolution designed to operate in a tax context. This is an area worthy of exploration, application and implementation for immediate benefit.

Chapters 6-8 bring together a model of taxpayers' rights from existing theory and practice. Each of the individual rights has been explored in great detail individually elsewhere in the literature. The analysis and synthesis draws from a broad range of diverse materials across disciplines and jurisdictions to provide a set of standards of best practice in tax administration. It is not available elsewhere in a single compilation and is likely to prove a useful aid to further comparative analysis and its practical implementation.

III. Conclusion

This book uses existing best practice in jurisdictions across the world. It also draws on the work of a wide range of authors, whose writing often provides a much more comprehensive analysis of the individual points they raise than is possible in a work that traverses such a broad field. Readers are encouraged to follow what they will find to be a fascinating journey of exploration through the works cited here in the footnotes and bibliography. Most important is that the points raised or referred to in this book should stimulate continued

debate on the theory and implementation of taxpayers' rights in diverse jurisdictions.

The rule of law is often caricatured as an excuse for the imposition of dry legalism far removed from the reality of its contextual implementation. This is the opposite of the truth. Rather, the law reflects society in all its guises while providing the broad precepts against which society has chosen to judge itself. The rule of law is not concerned simply with the law. Its spirit permeates its administration through the principles governing its application. Even the benchmarks and key performance indicators of management terminology are hedged around and guided in the administration of taxation by the principles of justice, equity, transparency, and accountability inherent in the operation of the rule of law. It is in this context that taxpayers' rights form a whole and should be seen as providing the appropriate balance between the rights of taxpayers and the rights of society to extract taxes from them.

CHAPTER ELEVEN

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